Supreme Court, U.S.
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No. ___

In the Supreme Court of the United States

JUNE O. CARLSON,
Petitioner,

v.

SCOTT BUKOVIC and
CITY OF DARIEN, ILLINOIS,
an Illinois Municipal Corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

1. In the aftermath of this Court's grant of certiorari in *Ortiz v. Jordan*, Supreme Court No. 09-737 (Apr. 26, 2010), is petitioner foreclosed from challenging on appeal the denial of her summary judgment motion on the grounds of a *per se* unreasonable seizure of her person after she was forced to try the case to a jury on the different and more onerous theory of liability that respondent Bukovic had used excessive force upon petitioner?

2. Where a law enforcement officer, without arresting the 83-year-old female petitioner, *admits* on summary judgment that he physically restrained and injured her upon his mistaken belief that she was trespassing, could the court of appeals nonetheless conclude as a matter of law that his conduct constituted neither a "seizure" nor a "*per se* unreasonable" seizure under the Fourth Amendment and that the absence of probable cause and reasonable suspicion to arrest her was irrelevant to petitioner's "unreasonable seizure" claim?

3. Is petitioner denied due process where the court of appeals deliberately misstates the undisputed summary judgment record in the district court, including the admissions made by respondent Bukovic about his use of force against petitioner, an elderly female citizen?

LIST OF ALL PARTIES.

The caption of the case contains the names of all the parties in the Seventh Circuit Court of Appeals which judgment is sought to be reviewed.

Petitioner June O. Carlson ("petitioner") was a plaintiff in the trial court and the appellant in the Court of Appeals. Respondent Police Officer Scott Bukovic (hereafter, "respondent") and his employer Respondent City of Darien (hereafter, "the City") were defendants in the trial court and appellees in the Court of Appeals. Petitioner June O. Carlson is a natural person; therefore, no corporate disclosure statement is provided.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE.

The opinion of the Seventh Circuit Court of Appeals dated September 2, 2010, is officially reported at 621 F.3d 610 (7th Cir. 2010) and is appended hereto at App. A at 1a-25a.

The district court's memorandum opinion and order dated June 9, 2008, granting summary judgment to the City of Darien and denying petitioner's motion for summary judgment as to liability against respondent and denying respondent's cross-motion for summary judgment, reported at 2008 WL 2397682 is appended hereto at App. B at 28a-60a.

The district court's memorandum opinion and order dated May 4, 2009, ruling upon respondent's motion *in limine*, reported at 2009 WL 1286004, is appended hereto at App. C at 61a-77a.

JURISDICTIONAL STATEMENT.

The court of appeals entered judgment on September 2, 2010 (App.26a, 27a). Petitioner's petition for rehearing or for rehearing *en banc* was denied by the court of appeals' Order on October 4, 2010 (App. 80a, 81a). This petition for certiorari is filed within ninety (90) days of the court of appeals' denial of petitioner's timely filed petition for rehearing or for rehearing *en banc* per Supreme Court Rules 13(1.) and (3.) and 30. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CITATIONS TO CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED.

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup- ported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ...

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1986:

Every person who, having knowledge that any of the wrongs conspired to be done..., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....

Fed. R. Civ. P. 56(c) and (e)(2):

(c). Serving the Motion; Proceedings. ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e)(2). Affidavits; Further Testimony. *....Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Illinois Criminal Trespass to Real Property statute, 720 ILCS 5/21-3:

(a) Except as provided in subsection (a-5), whoever:

(1) knowingly and without lawful authority enters or remains within or on a building; or

(2) enters upon the land of another, after receiving, prior to such entry, notice from the owner or occupant that such entry is forbidden; or

(3) remains upon the land of another, after receiving notice from the owner or occupant to depart; or

(3.5) presents false documents or falsely represents his or her identity to the owner or occupant of a building or land in order to obtain permission from the owner or occupant to enter or remain in the building or on the land;

commits a Class B misdemeanor.

For purposes of item (1) of this subsection, this Section shall not apply to being in a building which is open to the public while the building is open to the public during its normal hours of operation; nor shall this Section apply to a person who enters a public building under the reasonable belief that the building is still open to the public.

(a-5) Except as otherwise provided in this subsection, whoever enters upon any of the following areas in or on a motor vehicle ...

***

(f) This Section does not prohibit a person from entering a building or upon the land of another for emergency purposes. ***

(g) Paragraph (3.5) of subsection (a) does not apply to a peace officer or other official of a unit of government who enters a building or land in the performance of his or her official duties.

***

STATEMENT OF THE CASE.

On January 3, 2005, petitioner June Carlson("petitioner"), an 83 year-old widow, and her disabled adult son Paul who suffers from profound hearing loss, speech impairment and diabetes, went shopping at a Wal-Mart store in Darien, Illinois. Upon entering the store, they separated, each pushing his or

her shopping cart. While pushing his cart around an interior structural pillar on which was mounted a fire hose box, Paul accidentally brushed up against the box which had been damaged and had a jagged metal surface exposed which gashed his forearm. Duct tape previously applied to cover the jagged metal had been worn away leaving the metal exposed.

Petitioner was summoned by Wal-Mart staff using the store's loudspeaker system to the rear of the store where Paul, having difficulty communicating, was being administered first-aid. Petitioner became upset because Paul's wound was being treated with iodine, not an advisable treatment for diabetic individuals; the poor condition of the first aid kit; and her frustration that store management had allowed the hazard posed by the fire hose box to exist. In the course of Paul's filling out an injury report, the store manager felt threatened by Paul's loud voice and his pointing of a finger in her direction and she called the Darien police.

Respondent Scott Bukovic("respondent"), a police officer for the City of Darien, arrived at the store and acknowledged that he found the scene calm. Respondent was the lead officer and first questioned the store manager in the presence of petitioner and her son for the store manager's version of the events. The store manager accused Paul of threatening her or, at least, of making her feel threatened. Petitioner became agitated and twice, but only briefly—according to respondent, a matter of "just seconds"—interrupted stating that the store manager's version of events was untrue. Respondent inquired of the store manager what she desired and, according to respondent, the store manager wanted petitioner to leave the store

while Paul could remain to complete his injury report.

According to respondent's own deposition testimony:

> A. I explained to Ms. Carlson that management wanted her to leave and that she needed to leave or she *could* be arrested for criminal trespass.
> ***
> A. She stated that she wasn't leaving, that it was crazy, that she's not leaving.
> ***
> A. I, again, tried three to four times explaining to her management wanted her to leave, she needed to leave, could she please leave, otherwise she could be arrested.
> ***
> A. And she still didn't want to go.
> ***
> A. ...I told her that she needed to leave, she still didn't–hadn't left. I then reached by her arm, by her forearm, her upper arm, and I said, again, Ma'am, please you need to leave the store or you *can* be arrested.
> Q. What happened after that?
> A. She still didn't. I was still holding her arm and I said, "Ma'am please, you need to leave or ***you are going to be arrested***. At which time she freaked out and she started pulling her arms and I'm not leaving and started, you know, flailing her arms and getting loud and saying ***let go of me.***

(emphasis supplied).

According to respondent, petitioner put her hands up and crossed her arms in front of her chest. Instead of releasing her, respondent then grabbed onto one or both of her arms, claiming that he did so in order to prevent her from striking him and in order to calm petitioner down. In the process, respondent pushed and pulled petitioner's arms against her chest.

At trial, respondent testified:

Q. Now, in the layaway room, you did make ... physical contact with June Carlson, correct?
A. Yes, I did.
Q. Okay. And as soon as you made contact with her, what was her response?
A. She freaked out. She started to tighten up and attempt to pull away.
Q. All right. And how did you respond?
A. Initially when it happened, I held tighter to her arm to control her, also to keep her from flailing around or striking me.
Q. And you were worried about being struck by this elderly woman?
A. Yes, I was.
Q. And how tall are you, officer?
A. I am five-foot-eleven.
Q. And how much do you weigh, or how much did you weigh at that time?:
A. At that time, approximately 170 pounds, 175.
***
Q. Now, prior to your making physical contact with [petitioner], she hadn't threatened anyone with injury, had she?
A. No.

Q. Okay. And she was trying to pull away from you?
A. That is correct.
Q. All right. You had no objective reasons to believe she was going to strike you?
A. With her arms moving and flailing, she could strike me, yes.
Q. Well, if you had just released her and let her back off, why would you think she would strike you?
A. Well, eventually, I did release her.

According to respondent, he held onto petitioner for no more than five seconds; but he admitted that petitioner had sustained an injury to one of her wrists. Following the incident, respondent prepared and submitted to his police department a "Darien Police Department Resistance Response Report" which estimated petitioner as being 5' 3" tall and weighing 135 pounds and which stated: "Police Force Used: Hands" and "Injuries: Minor Visible Injury (redness, swelling, abrasion) [sustained by] 'Suspect'" (App. 82a-85a). During his deposition testimony, respondent admitted that Carlson had sustained redness to her left wrist:

Q. Did you–do you have any recollection of checking to see if she had been injured?
A. I recall the fact that I knew that there was redness, so from that I would gather that I did check.
Q. There was redness on what part of her body?
A. I believe around her wrist area.

Respondent also admitted that petitioner (who had been ambulatory) left Wal-Mart in a wheel chair.

Moreover, his summary judgment response admitted that a Hinsdale Hospital Emergency Room Report dated later that same day diagnosed petitioner as suffering from "contusions, back strain."

On January 3, 2007, petitioner filed her civil rights complaint against respondent and the City in federal district court. Count I charged respondent with committing an unreasonable seizure of her person in the nature of assault and battery; the complaint did *not* use the term "excessive force." Count III charged the City with failure to train respondent, specifically alleging that at no time had petitioner "committed or threatened to commit a criminal act" and that the City "had failed to train [respondent] in his handling of non-criminal matters, especially those involving elderly women."

Counts I and III, the only counts relevant to this petition, sought redress under the Fourth and Fourteenth Amendments of the United States Constitution and under civil rights laws of the United States of America, specifically, 42 U.S.C. Section 1983. The District Court's jurisdiction was posited on 28 U.S.C. Section 1331.

Respondent and the City answered petitioner's complaint on March 2, 2007, with respondent raising the single affirmative defense of qualified immunity.

It was undisputed that at no time had respondent placed petitioner under arrest. The Illinois statute prohibiting criminal trespass to real property (720 ILCS 5/21-3(a)) had been amended in 1996 to provide that the then existing provision making it a criminal trespass "to knowingly and without lawful authority

enter or remain within or on a building" would not thereafter apply "to being in a building which is open to the public while the building is open to the public during its normal hours of operation."

On March 24, 2008, petitioner moved for summary judgment against respondent for liability for his *per se* unreasonable seizure of her person based solely on the facts admitted by him. Petitioner's statement of *material* facts described the wrist injury which respondent *admitted* he had caused and omitted the other injuries she sustained since proof of those other injuries was *material* only to the issue of her damages and not to the issue of respondent's liability for the *per se* unreasonable seizure of petitioner's person.

As petitioner argued, respondent had no probable cause to believe a crime was being committed by petitioner when he seized her and "because there is no genuine issue of *material* fact and because, as a matter of law, the seizure of her person by force with resulting injury for the purpose of restraining her statutorily protected liberty to remain in the Wal-Mart building during normal business hours while her disabled son completed his accident report was contrary to clearly established law and *per se* wrongful and excessive, her motion for summary judgment on Count I only as to liability [should] be granted."

Pursuant to Local Rule, respondent filed his response to petitioner's statement of *material* facts as to which petitioner alleged there was no dispute; and *respondent therein admitted each and every allegation pertaining to his seizure of petitioner and the absence of probable cause for doing so.* Respondent and the

City also filed their own cross motions for summary judgment against petitioner.

In response to the City's summary judgment motion on petitioner's Count III *Monell* failure-to-train claim, petitioner asserted that Darien police officers including respondent did not receive reasonable or proper training concerning the meaning of "building" as used by 720 ILCS 5/21-3(a); its "open-to-the-public" exception as set forth in the last paragraph of subsection (a); and the use of force against private citizens in non-arrest situations.

On June 9, 2008, the district judge denied petitioner's summary judgment motion on Count I against respondent, denied respondent's motion for summary judgment on Count I against petitioner, and granted the City's motion against petitioner on Count III, entering judgment in its favor (App.28a-60a). In denying petitioner's summary judgment motion against respondent Bukovic, the district judge stated:

> The court agrees with Defendants that no seizure occurred at any time prior to or after the physical encounter between [petitioner] and [respondent]. Through that period, [petitioner] remained free to leave the Wal-Mart store and go anywhere else she desired. *** The mere fact that [petitioner] apparently wanted to stay in the store does not make [respondent's] actions during this time a "seizure."
> ***
> [Petitioner]'s additional argument that the seizure was unreasonable because [respondent] had no probable cause to arrest her for trespass or disorderly conduct are misplaced. As noted,

> [petitioner] has not stated a claim for false arrest and, thus, any purported lack of probable cause to arrest her for those crimes is irrelevant to her claim of unlawful seizure by use of excessive force in the nature of assault and battery.

(App.45a; 49a at footnote 11).

During the course of deciding pre-trial motions, the district judge made known to the parties that petitioner's claim for the unconstitutional seizure of her person under Count I was going to be submitted to the jury not on the theory of *per se* unreasonable seizure based on a lack of probable cause to arrest her but only on the theory that respondent had allegedly used excessive force upon petitioner under all the facts and circumstances. Thus, according to the district judge, whether or not petitioner had committed criminal trespass by insisting on remaining in the Wal-Mart store after being instructed by respondent to leave was immaterial and/or irrelevant. The trial judge accordingly refused to instruct the jury on the concept of a *per se* unreasonable seizure and, over petitioner's objection, instead told the jury that "in performing his job, a [police] officer can use force that is reasonably necessary under the circumstances."

Moreover, in order to find for petitioner, the trial court's Special Verdict Form required the jury to find first that petitioner had been "seized" and, second, that her proof had shown by a preponderance of the evidence that respondent had used excessive force against her.

A jury trial ensued in the district court on this "excessive force" version of petitioner's Fourth Amendment unreasonable seizure claim and petitioner, having decided to appeal from the denial of summary judgment on her "*per se* unreasonable seizure" iteration of her Fourth Amendment claim and from the grant of summary judgment in favor of the City, and recognizing the conflicting testimony at trial over the degree of force used against her person, made no motion for a judgment in her favor as a matter of law under Fed. R. Civ. P. 50(a).

On June 18, 2009, the jury found that petitioner had not been "seized" and the lower court entered judgment for respondent (App.78a, 79a). For the same reasons she had not moved for relief under Rule 50(a), petitioner did not seek a new trial under Fed. R. Civ. P. 50(b) or 59.

On appeal, the court of appeals unanimously affirmed the judgment below (App.1a-27a). It described petitioner's claim under Count I against respondent as being only a "Fourth Amendment excessive force claim" (App. 12a; 23a). It stated without citation to the record that "[t]he parties cross-moved for summary judgment on both outstanding claims" and petitioner "also claimed, however, that summary judgment was appropriate...on the *Monell* claim asserted against the City" (App.6a, 7a) In fact, Carlson *never* made any such claim and filed no motion for summary judgment against the City.

The court also alleged without explanation that "[petitioner's] version of the facts, described in her [summary judgment] motion, was very different from the version described by the defendants" (App 6a). *To*

the contrary, both respondent and the City admitted the version of the facts described in petitioner's motion for summary judgment against respondent.

Petitioner timely filed a petition for rehearing and, on October 4, 2010, the panel denied it without comment on its merits (App.E at 80a, 81a).

ARGUMENT FOR ALLOWANCE OF THE WRIT.

1. AFTER THIS COURT'S GRANT OF CERTIORARI IN *ORTIZ V. JORDAN*, SUPREME COURT NO. 09-737 (APR. 26, 2010), PETITIONER WAS ENTITLED TO *DE NOVO* APPELLATE REVIEW OF THE DENIAL OF HER SUMMARY JUDGMENT MOTION ON THE GROUNDS OF A *PER SE* UNREASONABLE SEIZURE OF HER PERSON AFTER SHE WAS FORCED TO TRY THE CASE TO A JURY ON THE DIFFERENT AND MORE ONEROUS THEORY OF LIABILITY THAT RESPONDENT HAD USED AN EXCESSIVE DEGREE OF FORCE UPON PETITIONER.

Before trial, petitioner moved for summary judgment against respondent for liability only for his unreasonable and unconstitutional seizure of her person under the facts *admitted* by him during discovery. Petitioner's statement of material facts incident to her motion described the wrist injury which respondent *admitted* he had caused. As petitioner argued, respondent had no probable cause to believe a crime was being committed by petitioner when he seized her and "because there [was] no genuine issue

of material fact and because, as a matter of law, the seizure of her person by force with resulting injury for the purpose of restraining her statutorily protected liberty to remain in the Wal-Mart building during normal business hours while her disabled son completed his accident report was contrary to clearly established law and *per se* wrongful and excessive, her motion for summary judgment on Count I only as to liability [should] be granted."

Pursuant to Local Rule, respondent and the City each filed their responses to petitioner's Statement of Facts; *and they admitted each and every allegation pertaining to respondent's seizure of petitioner and the absence of probable cause for doing so.*

Despite this summary judgment record, the district judge denied petitioner's motion and forced her to proceed to trial *not* on the facts admitted by respondent and the City incident to her motion----facts which showed indisputably a *per se* unconstitutional and unreasonable seizure of petitioner---but rather on a record of conflicting testimony over the degree of force respondent used against petitioner and whether that force was "excessive" or "reasonably necessary under the circumstances." Moreover, in order to find for petitioner, the trial court's Special Verdict Form required the jury to find first that petitioner had been "seized" and, second, that her proof had shown by a preponderance of the evidence that respondent had used excessive force against her, an entirely different and more onerous theory of liability than the *per se* unreasonable seizure established on summary judgment.

Petitioner deserved to have the denial of her summary judgment motion for respondent's admitted *per se* unreasonable seizure of petitioner subject to a discrete and separate *de novo* review by the court of appeals on a record uncontaminated by the conflicting testimony over the degree of force respondent used against petitioner and whether that force was "excessive" or "reasonably necessary under the circumstances."

The standards attendant to such *de novo* review have been established by this Court. Once petitioner moved for summary judgment under Rule 56 claiming the absence of a genuine issue of material fact for trial as to respondent's defenses including his claim of qualified immunity, the burden shifted to respondent to adduce facts which legitimately put in dispute petitioner's claim that he did not deserve this immunity in view of his factual admissions constituting a *per se* unconstitutional seizure. *Anderson v. Liberty Lobby,* 477 U.S. 242, 256-257 (1986). *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Court has enunciated two core principles in reading the summary judgment record below in order to resolve petitioner's motion: both the district judge and the court of appeals were bound: (1) to draw all reasonable inferences from the materials against petitioner and in favor of respondent; and (2) to resolve all credibility questions in favor of respondent because the courts' role is not to find facts but only to determine whether there are material fact issues for trial on petitioner's claim that respondent had committed a *per se* unreasonable seizure. *Scott v. Harris*, 550 U.S. 372, 378 (2007). *Beard v. Banks*, 548 U.S. 521, 529-530, 534 (2006). *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. at 249-255.

Implicated in this *de novo* review by the court of appeals is the recognition on this record that respondent *admitted* that he had caused petitioner's wrist injury; he *admitted* facts that demonstrated he had no probable cause -- applying this Court's "cardinal principle of statutory construction" set forth in *Duncan v. Walker*, 533 U.S. 167 at 174 (2001) and *Williams v. Taylor*, 529 U.S. 362 at 364 (2000) to the Illinois Criminal Trespass to Real Property statute -- to believe that petitioner had committed a crime; and he *admitted* each and every allegation pertaining to respondent's seizure of petitioner under color of authority for law enforcement purposes. In the face of respondent's serial admissions, the principles enunciated by this Court for resolving summary judgment motions converge to compel the conclusion that respondent was not entitled to any trial on the merits as to his liability for the commission of an unreasonable seizure under the Fourth Amendment in that petitioner was entitled to summary judgment as a matter of law that respondent had committed both a seizure of her person and one which was *per se* unreasonable.

Yet the court of appeals unfairly sidestepped this *de novo* review of the propriety of the district court's denial of petitioner's summary judgment motion and truncated petitioner's appeal into an examination of whether the force used by respondent was "excessive" or "reasonably necessary under the circumstances," ignoring the summary judgment record which unmistakably established a *per se* unconstitutional seizure of petitioner and instead examining the

conflicting testimony over the degree of force respondent used against petitioner. In doing so, the court of appeals noted that "[b]ecause the action was tried to a jury,...we must take the facts in the light most favorable to the party who prevailed at trial, Officer Bukovic, and draw all inferences in his favor" (App.2a, 3a). In this way, the court ignored the most probative evidence of respondent's own admissions establishing his liability for a *per se* unreasonable seizure of petitioner.

This case presents for resolution the question akin to the one for which this Court granted a writ of certiorari during 2010 in *Ortiz v. Jordan*, Supreme Court Docket No. 09-737, and upon which it heard oral argument on November 1, 2010: is petitioner foreclosed from challenging on appeal the denial of her summary judgment motion on the grounds of a *per se* unreasonable seizure of her person after she was forced to try the case to a jury on the different and more onerous theory of liability that respondent had used excessive force upon petitioner? This case presents a unique adjudicative fact pattern which holds the prospect for helping the Court identify under what circumstances, if any, the denial of summary judgment should be reviewable on appeal.

The court of appeals properly recognized two iterations of unreasonable seizure claims under the Fourth Amendment: (1) *per se* unreasonable seizures where the seizure was not supported by probable cause or reasonable suspicion (which thereby renders the use of any force under color of authority for law enforcement purposes excessive as a matter of law); and (2) otherwise lawful seizures, i.e., supported by probable cause or reasonable suspicion, but rendered

unreasonable by virtue of an excessive degree of force used to execute the seizure (App.21a at footnote 19). However, the court of appeals, like the trial court, maintained that the "*per se* unreasonable" iteration could be litigated only as part of a "false arrest" claim not present, and therefore not alleged by petitioner's complaint, on the facts of this case (App. 22a at footnote 19).

Petitioner's motion for summary judgment against respondent was predicated on the "*per se* unreasonable" iteration. The district court, however, limited the jury trial to the excessive-degree-of-force iteration. Common to both iterations was the necessity for petitioner to show by a preponderance of the evidence that respondent committed a seizure of her person within the meaning of the Fourth Amendment. But for petitioner to prevail at trial on the excessive-degree-of-force iteration required the jury to believe her version of the events about the massively greater force being applied by the respondent than the amount of force which he had already admitted to using. Because of the conflict in testimony as to whether respondent had applied far greater force to petitioner's person than the amount to which he himself had already admitted, petitioner believed it would be futile to engage in Rule 50 or 59 motion practice because the jury was entitled to believe either petitioner's or respondent's versions as to how much additional force, beyond the level of force he admitted using, respondent had, in fact, applied.

Summary judgment practice in the Northern District of Illinois is governed by Local Rule 56.1. It determines whether there are disputed issues of *material* fact by reference to the parties' submissions.

In the instant case, respondent admitted by his LR 56.1 factual response each and every specific factual allegation pertaining to his seizure of petitioner and the *per se* unreasonableness of such seizure due to the absence of probable cause and reasonable suspicion proffered by petitioner in support of her motion. Yet the court of appeals gave no consideration to this probative proof because it decided that it was foreclosed from doing so since the case had proceeded to a jury trial.

The court of appeals also upheld the district court's use of a Special Verdict Form "that tracked the law of Fourth Amendment excessive force claims" to the exclusion of petitioner's effort to place the issue of probable cause and therefore the *per se* unreasonable iteration of unreasonable seizure before the jury (App.11a; *see also*, 22a, 22b). The distinctive adjudicative fact pattern of this case suggests that the policy considerations urged by proponents of a stringent rule of non-reviewability of summary judgment denials are, as in *Ortiz v. Jordan*, *supra*, not always operative.

The first such policy consideration supporting non-reviewability is the argument that "to review the pretrial denial of summary judgment, courts have to review two different sets of evidence: the 'evidence' before the district court at pretrial when it denied the motion, and the evidence presented at trial." (*Ortiz*, Petition for Cert. at p. 17, citing to *Black v. J.I. Case*, 22.F.3d 568 at 572 (5th Cir. 1994)). However, in the instant case, because no Rule 50 motion was filed, the reviewing court is not called upon to review the evidence presented at trial; the only review required is of the record before the court at the time of summary

judgment. Indeed, neither petitioner's nor respondent's Seventh Circuit briefs reviewed the evidence presented at trial; the court of appeals undertook this effort *sua sponte* and possibly in violation of the rule prohibiting such review when not preserved by making of Rule 50(a) and (b) motions.

Second, *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987) reasons that the injustice suffered by an unsuccessful summary judgment movant is outweighed by the injustice to the party obtaining a jury verdict from having that verdict stripped away by a reviewing court's reversal of the denial of summary judgment. Here, however, the denial of summary judgment constituted a rejection of a legal theory (*per se* unreasonable seizure) supported by evidence--none of which was in dispute--separate and distinct from the legal theory that was tried to the jury (excessive degree-of-force unreasonable seizure) which did involve highly disputed testimony concerning the degree of force used by the respondent. Therefore, in order to afford petitioner proper review of the rejection of her prosecution of her *per se* unreasonable seizure theory of the case, review of the summary judgment order which denied her relief on such theory should be afforded as a matter of doing substantial justice to the parties on the merits.

Third, this is *not* a case where the reasoning of the district court for denying summary judgment was unknown or difficult to ascertain, given its written memorandum opinion and order (App. B at 28a-60a).

Accordingly, under the peculiar adjudicative fact pattern presented by this case, the position of the Third Circuit in *Pennbarr Corp. v. Insurance Co. of No.*

America, 976 F.2d 145, 150 (1992) should be adopted: "In reviewing a denial of a motion for summary judgment, we apply the same standard that should have been applied by the district court. *** We will reverse the decision to deny such a motion only if we find it plain that there is no genuine issue of material fact for trial. Our review of this question is plenary." *Id.* Such a position is also supported by the observation of Justice Alito during oral argument in *Ortiz* as follows:

> But what if the facts are utterly undisputed? ***. The only question is whether the right was clearly established, and the district court rejects that at summary judgment. What benefit–what is the point of saying that the defendants have to raise that same issue again in a Rule 50(b) motion? It's utterly a – a pointless exercise. (Tr., p. 16, 17; also, *see* p. 46)

The parties here had no disagreement about the facts marshaled in support of petitioner's motion for summary judgment. The only questions were whether the conduct admitted to by respondent amounted to a seizure as a matter of law and, if so, whether the seizure was *per se* unreasonable for want of probable cause and/or reasonable suspicion. Because petitioner could not hope to prevail at trial on Rule 50 motions in the face of an adverse jury verdict tried on a different, excessive-degree-of-force theory of the case, resort to Rule 50 procedure was pointless.

The Court in *Anderson v. Liberty Lobby*, 477 U.S. at 255, stated that a district court may properly deny summary judgment in a situation "where there is reason to believe that the better course would be to

proceed to a full trial." *Id.* There is no "better course" in this case because, on account of respondent's own admissions, he should not have been allowed by the courts below to escape the legal significance of his own admitted purpose, extent and effect of his initiation and escalation of physical contact for law enforcement purposes against petitioner under his show of authority. This case therefore presents a proper opportunity for this Court to define the contours for the reviewability of summary judgment denials following trial.

2. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A MANNER WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OR HAVE NOT BEEN SETTLED BUT SHOULD BE SETTLED BY THIS COURT.

There is no genuine issue of material fact about whether respondent used physical contact to enforce his show of authority over the person of petitioner that restricted her freedom of movement at the spot of the seizure and within the Wal-Mart store. This Court has articulated "seizure" thusly:

> Obviously, not all personal intercourse between policemen and citizens involves seizures of persons. Only when the officer, by means of physical force or show of authority, has **in some way** restrained the liberty of a citizen may we conclude that a "seizure has occurred." (*Terry v. Ohio*, 391 U.S. 1, 19 (1968), quoted approving by *Florida v. Bostick*, 501 U.S. 429 at 434 (1991)) It must be recognized that **whenever** a police

> officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Terry v. Ohio, 391 U.S. at 16.

It is clear on this record that petitioner's liberty to remain in the Wal-Mart store at the side of her disabled son as he completed his injury report or to continue to shop during normal business hours as a member of the public was being restrained. Her restraint of liberty need only occur "in some way." This restraint undeniably occurred here. Indeed, a person whose vehicle is stopped by a law enforcement officer is considered seized even though his own person is not even physically touched, unlike in this case. *Delaware v. Prouse*, 440 U.S. 648 (1979).

The court of appeals' conclusion otherwise runs afoul of this Court's precedents on seizure and creates a conflict within the Seventh Circuit itself. In *Acevedo v. Canterbury*, 457 F.3d 724, 725 (7th Cir. 2006), it was held that "[c]ertain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a 'seizure' for Fourth Amendment purposes." Both the district court and the court of appeals failed to apply this precedent. *Acevedo* plainly means that where, as here, there was a concomitant showing of authority—i.e., respondent's directive that petitioner leave the store upon pain of being arrested for trespass---even non-restraining physical contact of a minor nature constitutes a "seizure" for Fourth Amendment purposes.

Moreover, the court of appeals' conclusion that a *per se* unreasonable seizure can only be prosecuted

where false arrest is pleaded does not square with the decisions of this Court or with the decisions of other courts of appeal. The fundamental issue of constitutional law posed by this case is whether the officer can lawfully use any degree of goal-directed force intended for law enforcement purposes sufficient to result, at a minimum, in the reddening of the wrist of an 83-year-old unarmed woman who is not committing any crime, where the officer has no probable cause to believe she was committing a crime, where the officer is not executing an arrest warrant and where petitioner does not pose a flight risk from the scene. This Court's jurisprudence clearly answers this question in the negative, i.e, *no* amount of force can be lawfully applied to a United States citizen in such undisputed circumstances and any amount of force so applied constitutes an unlawful and *per se* unreasonable seizure. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Delaware v. Prouse*, *supra*; *Terry v. Ohio*, *supra*.

The court of appeals' ruling in this regard also fails to reflect and refuses to apply its own controlling law describing the only three categories of lawful interaction by law enforcement officers with United States citizens, the first two of which constitute Fourth Amendment seizures:(1) arrest supported by probable cause; (2) an investigatory stop supported by a well-grounded reasonable suspicion; and (3) voluntary cooperation through non-coercive questioning. *United States v. Nobles*, 69 F.3d 172, 180 (7th Cir. 1995).

To the same effect is *Lowery v. Stovall*, 92 F.2d 219, 222 (4th Cir. 1996) and *McCoy v. West*, 342 F.3d 842, 848 (8th Cir. 2003), where both courts of appeal identified the three controlling factors governing

reasonableness of a seizure under the Fourth Amendment as articulated by this Court in *Graham v. Connor*, 490 U.S. 386 (1989): (1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade by flight. See also *Couden v. Duffy*, 446 F.3d 483, 494 (3d Cir. 2006); *United States v. Butenko*, 494 F.2d 593, 604 (3d Cir. 1974).

Here *none* of these factors for the octogenarian petitioner was present and any seizure was therefore *per se* unreasonable under the Fourth Amendment standard irrespective of "false arrest" not being part of petitioner's claim. This legal reasoning is confirmed by this Court's decision in *Delaware v. Prouse*, *supra*, and *United States v. Jefferson*, 906 F.2d 346 (8th Cir. 1990). In both of those cases, the seizures were in a civil, not criminal context, and both seizures were ruled *per se* unreasonable under the Fourth Amendment.

3. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS IN ORDER TO REDRESS A DENIAL OF CARLSON'S FUNDAMENTAL RIGHT UNDER THE FIFTH AMENDMENT TO PROCEDURAL DUE PROCESS OF LAW.

The court of appeals engaged in the following deliberate misstatements of the factual record on appeal in order to shield respondent from the legal consequences of his own admitted conduct:

(A) With respect to petitioner's appeal from the denial of her motion for summary judgment, it observed that petitioner's "version of the facts, described in her motion, was very different from the version described by the defendants" (App.6a). This statement is blatantly untrue. Petitioner's version of summary judgment facts in support of her motion was provided to the Panel as an Appendix to her Brief; and respondent's version of the facts in response to petitioner's motion was also provided to the Panel as an Appendix. Even a cursory comparison reveals that respondent *admitted each and every factual allegation bearing on the issue of the commission of a seizure* raised by petitioner in support of her motion, as required for petitioner to prevail on her Rule 56 motion. This *indisputable fact* about the commission of a *per se* unreasonable seizure of petitioner was shown by the absence of any material fact regarding the issue and it was plainly pointed out to the Panel in petitioner's Briefs and at oral argument.

Thus the statement that petitioner's "version of the facts, described in her motion, was *very* different from the version described by the defendants," if it had been made by respondent's counsel, would have been conduct sanctionable under Fed. R. Civ. P. 11. But because this untrue statement was made by the court of appeals instead of by respondent's counsel, no sanction was forthcoming. Moreover, the only purpose apparent for the court's misrepresentation of the record was to justify its refusal to review by examination of the actual summary judgment record petitioner's appeal of the denial of her summary judgment motion on the entirely groundless basis that a genuine issue of material fact existed concerning the commission of a seizure when, in truth, none existed.

(B) Not only did the court of appeals misstate the true state of the record pertaining to petitioner's summary judgment motion, it also deliberately omitted from its recitation of the facts what the respondent himself had *admitted*: using force against petitioner as part of his physical intervention to remove her from the Wal-Mart store against her will sufficient to injure her. Specifically, respondent admitted both at summary judgment and at trial to filling out and filing with his Department an official report which confirmed his use of force against petitioner and her resulting injury–an injury which he admitted occurred after petitioner protested his initial contact with her exclamation "let go of me" and tried to pull away; and respondent admitted escalating the intensity of his objected-to physical contact resulting in the injury to petitioner's wrist.

Only by *deliberately omitting* respondent's own admission of his heightened use of force and of his making out an official use-of-force report, could the panel falsely write: "[t]he jury also was entitled to reach the opposite conclusion: [respondent's] contact with [petitioner's] arm may have been so slight and so momentary that it did not convey, to the objective observer, a demonstration of anything more than an encouragement that she leave the area" and that "the jury was entitled to determine that, at the time he touched [petitioner's arm, [respondent's] action was just this type of *gesture*: more exhortatory than commanding" (App.19a). The court of appeals was disingenuous when it wrote that one of the "disputed facts" was "whether [respondent] 'intentionally applied some degree of force to the person of Plaintiff'" (App.11a). In truth, *there was no such dispute* about

whether he had intentionally applied some degree of force to petitioner's person.

(C) At multiple points in its opinion, the court of appeals caricatured the arguments on appeal made by petitioner's counsel including the untrue statement that petitioner "essentially maintained that any touching used by an officer to influence a citizen's movements constitutes a Fourth Amendment seizure" (App.10a).

(D) The opinion falsely describes petitioner's complaint as pleading only the "excessive force" iteration of a claim to have been unreasonably seized under the Fourth Amendment (App.2a; 12a; 23a) when, in truth, the complaint never used the term "excessive force" or "aggravated battery" but instead expressly alleged absence of any criminal conduct by petitioner.

It is one thing for a reviewing court to overlook, misinterpret or misapply the law or misapprehend arguments. But fair judicial process consonant with due process requires a reviewing court to fairly and dispassionately state the factual record below, not to deliberately distort it and suppress crucial factual admissions made by a party–here, the damning admissions by the respondent of his use of force against an elderly female American citizen under his show of authority for mistaken law enforcement purposes.

Petitioner therefore requests that the Court exercise its supervisory power in order to correct the fundamental factual errors which the court of appeals has committed, errors which have so undermined the

accepted and usual course of judicial proceedings that the factual record below has been egregiously misstated to petitioner's detriment. The only inference to be drawn from that court's mishandling of the facts of this case is that it had no intent of providing petitioner a fair and dispassionate review of her appeal.

CONCLUSION.

For all of the reasons stated herein, the Court should grant a writ of certiorari to review and vacate the judgment of the court of appeals, remand the matter to the district court for further consideration of petitioner's claims against respondent for the *per se* unreasonable seizure of her person; or provide her with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 09-2578

JUNE O. CARLSON,
Plaintiff-Appellant,

v.

SCOTT BUKOVIC, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 1:07-cv-00006—**Nan R. Nolan**,
Magistrate Judge.

ARGUED FEBRUARY 17, 2010—
DECIDED SEPTEMBER 2, 2010

Before RIPPLE, MANION and SYKES, *Circuit Judges*.

RIPPLE, *Circuit Judge*. June Carlson brought a multi-count civil rights action under 42 U.S.C. § 1983 against Officer Scott Bukovic and the City of Darien,

an Illinois municipal corporation. Certain counts were dismissed by the district court and are not at issue in this appeal. Remaining are a Fourth Amendment excessive force claim against Officer Bukovic and a *Monell*[1] claim against the City for failure to train the officer.[2] With respect to these claims, the parties cross-moved for summary judgment. The district court granted summary judgment in favor of the City on the *Monell* claim but denied summary judgment to both parties on the excessive force claim. That claim proceeded to trial, and a jury determined that Officer Bukovic did not violate Ms. Carlson's constitutional rights because no Fourth Amendment seizure had occurred. Ms. Carlson now appeals the district court's final determination of both the excessive force claim and the *Monell* claim. For the reasons stated in this opinion, we affirm the judgment of the district court.[3]

I

BACKGROUND

A.

The facts surrounding Ms. Carlson's excessive force claim were contested initially. Because the action was tried to a jury, however, we must take the facts in the light most favorable to the party who prevailed at

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[1] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978).

[2] The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331.

[3] We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

trial, Officer Bukovic, and draw all inferences in his favor. *See Majeske v. City of Chi.*, 218 F.3d 816, 820 (7th Cir. 2000).

On January 3, 2005, Ms. Carlson and her son, Paul Carlson, visited the WalMart store in Darien, Illinois. At that time, Ms. Carlson was approximately 83 years old; Mr. Carlson is a handicapped adult. During their visit to the store, Mr. Carlson scratched his arm on a fire hose box and reported the incident to store employees. The employees consequently requested that Mr. Carlson complete certain forms. During that process, a dispute arose between the store employees and the Carlsons over whether the store would provide Ms. Carlson with copies of the forms. The store manager explained:

> Well, as [Ms. Carlson] was upset and agitated by not having the forms, [Mr. Carlson] made a gesture towards me as to come towards me where I felt like I was threatened by his actions, and then I had asked him to step back, that I had felt threatened by him coming towards me. And there was some—a little bit of commotion. When I did ask him to step back, he did move back, and I remember her saying that, we're not threatening you. And I remember stating, no, I feel threatened, and, you know, I'm asking for him to step back. He made a step again.
>
> And then at some point in time . . . we phoned the police department to help, not to banish them or—but to alleviate the situation because at that point in time, I felt threatened to the point where it was—I would not be able to end the situation.

Trial Tr. at 454-55. A store employee called the City of Darien Police Department to complain that the Carlsons were being disruptive.

Darien Police Officers Scott Bukovic and Richard Stutte soon arrived and asked the store manager what had happened. The manager explained that Mr. Carlson had scratched his arm and that, during the claims process, he had become loud and threatening. Ms. Carlson accused the manager of lying and tried to interrupt Officer Bukovic's conversation with the manager several times. Ms. Carlson's voice was raised; she was upset and, by some accounts, hysterical. She tapped Officer Bukovic on the arm, to which he said, "let me finish with [the store manager], please don't touch me, and then I will get to you." Trial Tr. at 461.

Officer Bukovic spoke next to Mr. Carlson, who explained his side of the story. Officer Bukovic observed Mr. Carlson to be loud and boisterous. Officer Bukovic relayed to the manager what Mr. Carlson had said; the manager reiterated that she had felt threatened. Officer Bukovic believed the manager.

Officer Bukovic then attempted to get Ms. Carlson's side of the story, but she would not explain what had happened. Ms. Carlson said that the manager was lying. Ms. Carlson's manner also was loud and boisterous. Officer Bukovic then asked the store manager what she wanted him to do. The manager said that Mr. Carlson could remain and complete his paperwork, but that Ms. Carlson would have to leave the store because she was being disruptive. Officer Bukovic told Ms. Carlson that, if she did not leave, he could arrest her for trespass. Ms. Carlson said she

would not leave because she was concerned about her son.

Officer Bukovic tried three or more times to convince Ms. Carlson to leave the store, but she would not go. As Officer Bukovic made his last request, he reached for Ms. Carlson's right arm with both of his hands, placing one hand on her forearm and one hand on her upper arm. The touch was a calm, escorting gesture in an attempt to guide Ms. Carlson out of the store. The Personnel Manager of the WalMart, who witnessed the scene, testified that Officer Bukovic "was just asking her to—that it was time to leave the store, I think, and he kind of went like this. . . . To like you would do a grandmother, you know, to sort of maybe turn towards the exit. He barely touched her, and she started screaming." Trial Tr. at 392-93.[4]

The Store Manager of the WalMart testified that "when the officers went to go help [Ms. Carlson] to the front door or escort [her] to the front door, one of them—how can I describe it?—as if you were helping your grandma through the parking lot on an icy day, grabbed her elbow, let me help you to the front." *Id.* at 462. Ms. Carlson "freaked out" and began flailing her arms. *Id.* at 511. Officer Bukovic grabbed onto one or both of her arms to prevent her from striking him and, at the same time, tried to get her to calm down. Ms. Carlson put her hands up and crossed her arms in

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[4] *See also* Trial Tr. at 400 ("He didn't really have any physical actions with her other than when he barely—when he put his arm around her, but that was like you would to your grandmother or something, or mother or something if you were saying, you know, let's go this way. It's more of a guiding manner than—there was no other physical interaction that I saw.").

front of her chest. The incident lasted no more than five seconds.[5]

After Ms. Carlson had calmed down, Officer Bukovic asked her if she needed any medical attention, but she refused to acknowledge him. Eventually, she left the store. The officers did not arrest Ms. Carlson.

B.

The Carlsons brought this action against various WalMart corporate entities, the City of Darien and Officer Bukovic. After filing a series of amended complaints, Mr. Carlson abandoned his claims, and Ms. Carlson narrowed her complaint to consist only of a Fourth Amendment excessive force claim against Officer Bukovic and a section 1983 *Monell* claim against the City for failure to train. Importantly, Ms. Carlson disavowed any intention to assert a Fourth Amendment false arrest claim.[6]

The parties cross-moved for summary judgment on both outstanding claims. Ms. Carlson's version of the facts, described in her motion, was very different from the version described by the defendants. She essentially contended that Officer Bukovic attacked and brutalized her in the WalMart store. Ms. Carlson contended that, because Officer Bukovic had touched her, no genuine issue of material fact existed as to whether a Fourth Amendment seizure had occurred.

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[5] *See* Trial Tr. at 187-90, 201-03, 393-400, 412, 469, 488, 511-12.

[6] *See* Appellant's Br. 22; *see also* Tr. at 20, May 18, 2009 ("We're not bringing a false arrest claim."); Tr. at 4-6, June 5, 2009 ("This is not a false arrest case.").

She also claimed, however, that summary judgment was appropriate on the reasonableness of the force used, as well as on the *Monell* claim asserted against the City. The defendants cross-moved for summary judgment on those same issues and also asserted that Officer Bukovic was entitled to qualified immunity.

The district court[7] denied the cross-motions for summary judgment because a genuine issue of material fact existed as to whether Officer Bukovic had seized Ms. Carlson.[8] The district court also concluded that, due to the conflicting factual accounts, a genuine issue of material fact existed as to whether the seizure, assuming one had occurred, was unreasonable. The district court also denied Officer Bukovic qualified immunity due to the factual differences. However, the district court granted the City summary judgment on the *Monell* failure-to-train claim.

Ms. Carlson asked the court to reconsider its ruling; she argued that the force used by Officer Bukovic, even though minimal, was a seizure as a matter of law. She essentially maintained that *any* touching used by an officer to influence a citizen's movements constitutes a Fourth Amendment seizure. In her view, the district court's contrary ruling was

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[7] The parties agreed to have the case tried before a magistrate judge. *See* 28 U.S.C. § 636(c); *see also* R.15 (joint consent form).

[8] *See* R.82 at 12 ("There is a question of fact as to the nature of the physical interaction between Plaintiff and Officer Bukovic and, thus, summary judgment is not appropriate to either party on this portion of Plaintiff's claim that she was seized in violation of the Fourth Amendment.").

based on a misunderstanding of established Supreme Court precedent governing the law of Fourth Amendment seizure. She further argued that other cases that had determined that, despite the occurrence of some physical contact, no Fourth Amendment seizure had taken place were not controlling. The district court denied that motion.

Prior to trial, Officer Bukovic filed a motion in limine to exclude, among other things, any reference to or statement about Ms. Carlson's lawful presence in the WalMart store. *See* R.112 (item #9).[9] Officer Bukovic argued that, because Ms. Carlson had not advanced a Fourth Amendment false arrest claim, the issue of Ms. Carlson's lawful presence at the WalMart store was irrelevant to the excessive force claim to be tried.[10] He contended that, in any event, Ms. Carlson's reading of the Illinois trespass statute was legally incorrect because the criminal law of Illinois prohibits remaining on the property of another after having been asked to leave. Officer Bukovic contended that Ms. Carlson's anticipated presentation of the trespass issue would be erroneous and would mislead the jury. He asked that such evidence be excluded under Federal Rule of Evidence 403.

Ms. Carlson opposed the motion. She contended that the issue of her lawful presence and Officer Bukovic's probable cause to detain her were central to

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[9] Ms. Carlsons's attorney had posed questions during Officer Bukovic's deposition about whether he believed he could have arrested Ms. Carlson for trespassing. Officer Bukovic anticipated that Ms. Carlson intended to discuss the trespass issue at trial.

[10] *See* R.112; *see also* Tr. at 18-20, May 18, 2009.

the action. She further argued that the Illinois criminal trespass statute did not apply because the statute included an "open to the public" exception. Tr. at 76-77, May 18, 2009. She maintained that the issue was related to the reasonableness of Officer Bukovic's seizure, and, thus, testimony about the trespass issue should be admissible at trial.

The district court granted the motion in limine, ruling that "injecting the issue of criminal trespass will mislead and confuse the jury and lead to unfair prejudice." R.124 at 5 (citing Rule 403). The district court also ruled:

> Ms. Carlson may argue only that she did not want to leave and that she did not believe she was trespassing because the store was open to the public; she was there during normal business hours; and she was not creating a disturbance. Officer Bukovic, in turn, may argue that he believed Ms. Carlson was trespassing because the store owner wanted her to leave; she refused his order to leave; and she was behaving in a disruptive manner.

Id. at 5-6. Over the course of several pretrial conferences, Ms. Carlson asked the district court to reconsider its ruling. However, the district court steadfastly maintained that, because Ms. Carlson had disavowed any intention to assert a Fourth Amendment false arrest claim, the issue of Ms. Carlson's legal status on the WalMart property and

Officer Bukovic's probable cause to seize her were irrelevant to the issues to be tried.[11]

With these parameters in place, the district court conducted a four-day jury trial. The evidence consisted of testimony from Officer Bukovic, Ms. Carlson, Mr. Carlson, the WalMart store employees and Ms. Carlson's doctors. The evidence established that Officer Bukovic asked Ms. Carlson to leave the store, and that he momentarily placed his hands on her arm.

Unsatisfied with the parties' proposed jury instructions, the district court crafted instructions using the Seventh Circuit and Ninth Circuit pattern instructions on the law of Fourth Amendment excessive force claims. The district court removed references to arrest situations and, instead, proposed giving instructions on how to determine whether a Fourth Amendment *seizure* had occurred.

Ms. Carlson objected, primarily taking issue with the court's instruction that "in performing his job, an officer can use force that is reasonably necessary under the circumstances." *See* R.151. She maintained that any touching by an officer without probable cause to detain was per se unreasonable. She proposed several alternative instructions. The first would have required the jury to determine whether Officer Bukovic had probable cause to detain her for questioning. Another would have instructed that, if Officer Bukovic lacked probable cause to detain, any "knowing or intentional use of force . . . is automatically [that is, *per se*] unreasonable." *See* Appellant's Br. 24 (brackets in

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[11] *See* Tr. at 19-21, May 18, 2009; *see also* R.145 at 12-14.

original); *see also* Tr. at 33-37, June 15, 2009. Ms. Carlson also proposed an instruction essentially requiring the jury to find that she was not trespassing because she was in the store during normal business hours. *See* Appellant's Br. 26.

The district court rejected Ms. Carlson's proposed instructions because they misstated the law of Fourth Amendment excessive force claims. The district court decided to give the instructions that it had formulated. The parties also disagreed over how the verdict form should be structured. Ms. Carlson proposed a special verdict form that would have asked the jury nine questions about disputed facts, such as whether Officer Bukovic "intentionally applied some degree of force to the person of Plaintiff." *See* R.183.[12] Her proposed verdict form also asked the jury to determine whether Officer Bukovic had "probable cause to believe that Plaintiff was committing the crime of disorderly conduct" and "the crime of criminal trespass to property in his presence." *See id.*

The district court rejected Ms. Carlson's proposed verdict form because it interjected irrelevant issues and would confuse the jury. Instead, the district court fashioned a special verdict form that tracked the law of Fourth Amendment excessive force claims. It asked: "Do you find that Plaintiff has proven by a preponderance of evidence that Defendant, Scott Bukovic[,] 'seized' Plaintiff, June Carlson, as that term has been defined in these instructions?"; if the jury answered "yes" to that question: "Do you find that Plaintiff has proven by a preponderance of evidence

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[12] *See also* Tr. at 2-10, 15-16, June 11, 2009.

that Defendant, Scott Bukovic[,] used 'excessive force' against Plaintiff, June Carlson, as that term has been defined in these instructions?" R.185.

The jury answered no to the first question, concluding that no Fourth Amendment seizure had occurred. The district court accepted the verdict. Ms. Carlson did not file a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50.

II

DISCUSSION

A.

The Section 1983 Fourth Amendment Excessive Force Claim

Ms. Carlson's primary contention is that the district court erred by sending the question of whether there was a seizure to the jury because Officer Bukovic's touching was a seizure as a matter of law and that the seizure was "per se" unreasonable.[13]

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[13] We do not understand Ms. Carlson's argument to be related solely to the sufficiency of the evidence—an argument that was waived when Ms. Carlson neglected to file a Rule 50 motion at trial. *See Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401-02 (2006). To the extent Ms. Carlson appeals purely legal issues—she contends that the district court misapprehended the law of Fourth Amendment seizure, erred by granting the motion in limine and erred by rejecting her preferred verdict form—such issues have been preserved for our review. *See Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 940 (7th Cir. 2006) ("[T]he ability of the court of appeals to award a new trial where there is prejudicial evidentiary error is well-established and undisturbed

Throughout the district court proceedings, Ms. Carlson maintained that she was "seized as a matter of law" and that the seizure was "per se unreasonable." As her counsel stated at one point: "[E]ven though Defendant opted not to arrest Plaintiff, his initiation and continuation of unconsented-to physical contact against her person, no matter how brief, falls within an exception to the *per se* unreasonable rule only if he had probable cause to arrest her." R.132 at 11. The district court correctly rejected Ms. Carlson's formulations of the law.

Any Fourth Amendment inquiry necessarily begins with a determination of whether a search or seizure actually occurred. *See Scott v. Harris*, 550 U.S. 372, 381 (2007) (beginning a section 1983 Fourth Amendment excessive force inquiry with a determination that a seizure occurred and then turning to whether the force used was unreasonable); *Leaf v. Shelnutt*, 400 F.3d 1070, 1089 (7th Cir. 2005) ("In order to determine whether [an officer] seized [an individual] in violation of the Fourth Amendment, . . . [w]e first consider whether [the individual] was seized . . . ."). *If* that question is answered in the affirmative,

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by *Unitherm*."); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 720 (7th Cir. 2003) ("[I]f the legal question can be separated from the factual one, then we see no bar to reviewing the legal question notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial."); *see also Pediatrix Screening, Inc. Telechem Intern., Inc.*, 602 F.3d 541, 548 (3d Cir. 2010) ("Given the length and breadth of the District Court's examination of the issues and the opportunities extended to both parties to present their arguments, we are satisfied that [the plaintiff's legal] challenge was fully aired in the District Court and preserved for appellate review.").

the next question is whether the seizure was unreasonable. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) ("'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'"); *see also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (distinguishing the seizure inquiry from the reasonableness inquiry); *Leaf*, 400 F.3d at 1089 ("[I]f we conclude that [the individual] was seized, we then must determine whether the seizure was unreasonable."). The seizure and reasonableness inquiries are distinct and should not be conflated. Furthermore, an officer's probable cause to seize is not antecedent to this two-step inquiry but rather is a subset of the larger reasonableness inquiry of the second step.

With respect to the first inquiry—whether there has been a seizure—the traditional approach is whether the person believed he was "free to leave." This standard is an objective one and "is made on the basis of the 'totality of the circumstances' surrounding the encounter." *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). For an understanding of this standard, we begin with Justice Stewart's opinion in *United States v. Mendenhall*, 446 U.S. 544 (1980), and the plurality opinion of the Supreme Court in *Florida v. Royer*, 460 U.S. 491 (1983).[14] In *Mendenhall*, Justice

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[14] In *Florida v. Royer*, 460 U.S. 491 (1983), Justices Marshall, Powell and Stevens joined an opinion authored by Justice White, adopting the "reasonable person-free to leave" standard enunciated in Justice Stewart's decision in *United States v. Mendenhall*, 446 U.S. 544 (1980). Justice Blackmun joined, in his dissenting opinion, the plurality's adoption of that standard. *See Royer*, 460 U.S. at 514 (Blackmun, J., dissenting).

Stewart noted that physical contact with the police was but one of several "circumstances that might indicate a seizure." *See Mendenhall*, 446 U.S. at 554. Additional circumstances include the number and threatening presence of officers, the display of a weapon and the police officers' language and tone of voice suggesting compulsion. *Id.* at 554-55. In *Royer*, the Court determined that a seizure had occurred in an airport when the officers took a man's plane ticket and license, thus preventing him from walking away. *See* 460 U.S. at 504-06. In both cases, the focus was squarely on whether a reasonable person would have felt free to leave.

Later, in *I.N.S. v. Delgado*, 466 U.S. 210 (1984), the Court ruled that immigration "sweeps" in workplaces, whereby government agents asked questions of workers while other agents stood at the doors, did not constitute a Fourth Amendment seizure. The Court explained that "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *Id.* at 216. Notably, the agents had tapped one of the workers on the shoulder and asked her questions; the Court found that no seizure had occurred. *Id.* at 220. In *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), while holding that "there can be no question that apprehension by the use of deadly force is a seizure," the Court reaffirmed the continued viability of the *Mendenhall* totality of the circumstances approach because, in other circumstances, "it is not always clear just when minimal police interference becomes a seizure."

In cases where physical contact with a citizen occurred, the Court has suggested that the official *purpose* of the contact matters.[15] In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court reversed an appellate court determination that a police roadblock that caused a fatal car crash was not a seizure. The Supreme Court determined that the roadblock was indeed a seizure because the roadblock effectively *controlled* and *stopped* the suspect. The Court explained,

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. . . . In sum, the Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct.
>
> . . . .
>
> . . . It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is

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[15] The purpose of an encounter must not be confused with an officer's subjective intent when engaging the encountered individual. The reasonable person-free to leave standard is an objective one, and both the officer's and the encountered individual's subjective beliefs during the encounter are not determinative as to whether a seizure occurred. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(a), pp. 413-14 (4th ed. 2010).

> a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Brower, 489 U.S. at 596-97 (internal citations and quotation marks omitted) (emphasis in original); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (concluding that no seizure occurred where the police accidentally struck and killed a motorcyclist during a high-speed pursuit). The Court expanded on that rationale in *California v. Hodari D.*, 499 U.S. 621, 624-29 (1991), where the Court determined that no seizure occurred when a suspect was approached by police, then ran away and was chased. The Court stated that "[t]he word 'seizure' readily bears the meaning of laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 626. The Court cited with approval commentary that explained that an arrest could be accomplished by "'constructive detention,'" which "'is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest *and for that purpose*.'" *Id.* at 625 (citing A. Cornelius, Search and Seizure 163-64 (2d ed. 1930)) (emphasis added). Finally, an important caveat to the free to leave standard, often employed in bus sweep contexts, is that "when a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Brendlin v.*

Cal., 551 U.S. 249, 255 (2007) (quoting *Bostick*, 501 U.S. at 435-36).

As this discussion makes clear, mere physical contact by an officer, although a significant factor, does not *automatically* qualify an encounter as a Fourth Amendment seizure. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(a), p. 427 (4th ed. 2010) ("Even physical contact is acceptable if it is consensual, a normal means of attracting a person's attention or obviously serves some nonseizure purpose." (internal quotation marks and citations omitted)); *see also id.* at n.85 & accompanying text (commenting that "physically grabbing and moving the suspect," with a concomitant show of force and authority, may indicate that a seizure occurred). For instance, we have suggested that physical contact does not elevate automatically an encounter to the level of a Fourth Amendment seizure. As we said in *Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006), "[c]ertain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a 'seizure' for Fourth Amendment purposes without doing violence to that word." *See also Williams v. City of Champaign*, 524 F.3d 826, 829 (7th Cir. 2008) ("In constitutional tort cases (including cases brought to vindicate rights created by the Fourth Amendment) as elsewhere in the law, *de minimis non curat lex*."); *Leaf*, 400 F.3d at 1090-91 (determining that no seizure occurred where officers pointed guns and shined lights towards a sleeping man, even if they nudged him). In sum, there are, of course, situations in which the totality of the circumstances require a determination that a seizure has occurred as a matter of law. *See, e.g.*, *Tenn. v. Garner*, 471 U.S. 1, 7 (1985) (fatal

shooting of suspect constituted seizure). However, it is also clear that a mere touch is not *per se* a seizure under the Fourth Amendment.

The application of these principles to this case centers on the question of whether a seizure took place. In this case, this question admittedly is one of some difficulty. We conclude, accordingly, that the district court correctly submitted the matter to the jury. Even accepting the evidence in the light most favorable to Officer Bukovic, we cannot characterize the situation as the sort of de minimis touching that, as a matter of law, has no Fourth Amendment implications. There certainly was evidence of record that would have permitted the jury to determine that a seizure in fact did take place. On the other hand, the jury also was entitled to reach the opposite conclusion: Officer Bukovic's contact with Ms. Carlson's arm may have been so light and so momentary that it did not convey, to the objective observer, a demonstration of anything more than an encouragement that she leave the area. We must remember that police officers find themselves in a myriad of contentious, and potentially explosive, situations where in an effort to defuse the situation, a combination of verbal declarations and gestures must be employed. When considered in context, such actions may be more exhortatory than commanding in nature. While it could have determined otherwise, we believe that the jury was entitled to determine that, at the time he touched Ms. Carlson's arm, Officer Bukovic's action was just this type of gesture: more exhortatory than commanding. The appropriate characterization of this situation was a question for the jury after it had heard all the evidence. *Cf. Acevedo*, 457 F.3d at 725 (concluding that the question of whether an officer seized an individual

by punching him in the face was a question for the jury).

The district court's formulation of jury instructions adequately articulated these legal principles.[16] The district court informed the jury that the seizure determination depended on whether Ms. Carlson's liberty was restrained and whether "a reasonable person would not have felt free to ignore the presence of law enforcement and to go about her business." Trial Tr. at 568. The jury was instructed to evaluate objectively the totality of the circumstances. The district court provided, moreover, appropriate factors to guide the jury's consideration of the issue. Ms. Carlson was not entitled to an instruction that made the determination depend entirely on whether physical contact had occurred; that factor is but one that the jury ought to consider. *See Mendenhall*, 446 U.S. at 554.[17] Nor was Ms. Carlson entitled to an instruction linking the seizure inquiry to the issue of probable cause because

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[16] Ms. Carlson does not dispute that the jury was competent to serve as the factfinder on the issue of whether a Fourth Amendment seizure had occurred. Indeed, that proposition is well established. *See, e.g.*, *Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006) ("Based on this testimony, a reasonable jury could have found that Acevedo was seized by Canterbury's blow to his head."); *Driebel v. City of Milwaukee*, 298 F.3d 622, 638 (7th Cir. 2002) (commenting that "a rational jury might very well conclude that Officer Sgrignuoli . . . was seized by the detectives who accosted him," but assuming that seizure had occurred); *see also Gardenhire v. Schubert*, 205 F.3d 303, 313-15 (6th Cir. 2000); *Hawkins v. City of Farmington*, 189 F.3d 695, 702 (8th Cir. 1999); *Cassady v. Tackett*, 938 F.2d 693, 697-98 (6th Cir. 1991).

[17] *See also* 4 Martin A. Schwartz & George C. Pratt, Section 1983 Litigation § 8.01 (2d ed. 2009) (Instruction 8.01.7).

those concepts are not to be conflated. The district court did not abuse its discretion in rejecting Ms. Carlson's proposed jury instructions.

The district court also acted well within its discretion when it declined to give a jury instruction describing the Illinois criminal trespass statute and when it precluded Ms. Carlson from presenting evidence to show that she had not violated the statute.[18] Whether the statute was violated was not relevant to the threshold issue of whether a seizure had occurred. Determining whether a seizure occurred needed to be decided separate and apart from the question of reasonableness.[19]

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[18] We review a rejected jury instruction in comparison to the actual charge issued by the district court. *See Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chi.*, 488 F.3d 739, 751 (7th Cir. 2007). We review Rule 403 rulings for abuse of discretion. *See Estate of Moreland v. Dieter*, 395 F.3d 747, 754-55 (7th Cir. 2005).

[19] Additionally, the trespass issue had very little relevance to whether Officer Bukovic used excessive force in committing the alleged seizure. The doctrine of Fourth Amendment reasonableness has distinct, component parts. A seizure without probable cause is conceptually different from a seizure that employs excessive force; both are unreasonable, but for different reasons. *See Evans v. Poskon*, 603 F.3d 362, 364 (7th Cir. 2010) (distinguishing between Fourth Amendment unreasonableness based on lack of probable cause and excessive force in the exclusionary rule context); *McKenna v. City of Phila.*, 582 F.3d 447, 460 (3d Cir. 2009) ("The District Court properly rejected Timothy McKenna's argument that it should have instructed the jury, which rejected plaintiffs' excessive force claims, that any amount of force used to effect an arrest without probable cause is *per se* excessive. [That] statement of the law is unsupported by citation, and, moreover, is wrong. As the Court correctly

For the same reasons, the district court acted well within its discretion in declining to approve a verdict form submitted by Ms. Carlson. It simply did not

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concluded, the jury was required to review any excessive force claims under a totality of the circumstances test, as enunciated in *Graham v. Connor*, 490 U.S. 386 (1989), to determine whether the force used was reasonable." (parallel citations omitted)); *Snell v. City of York, Pa.*, 564 F.3d 659, 672-73 (3d Cir. 2009) (rejecting "efforts to bootstrap excessive force claims and probable cause challenges"); *Cortez v. McCauley*, 478 F.3d 1108, 1127 (10th Cir. 2007)(distinguishing between Fourth Amendment excessive force and false arrest claims); *Papineau v. Parmley*, 465 F.3d 46, 62 (2d Cir. ("[T]he reasonableness test established in *Graham* remains the applicable test for determining when excessive force has been used, including those cases where officers allegedly lack probable cause to arrest."); *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004) ("Because the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make an arrest does not establish an excessive force claim, and vice-versa.").

Of course, we have recognized false arrest as a valid basis for a section 1983 Fourth Amendment claim. *See Bentz v. City of Kendallville*, 577 F.3d 776, 779 (7th Cir. 2009) ("Where an arrest occurs without probable cause, the plaintiff may bring a claim for unreasonable seizure."). Such a claim necessarily focuses the reasonableness metric on the existence of an officer's probable cause to detain. *See, e.g.*, *Belcher v. Norton*, 497 F.3d 742, 748 (7th Cir. 2007). Often times, Fourth Amendment excessive force and false arrest claims are asserted in the same action. *See, e.g.*, *Catlin v. City of Wheaton*, 574 F.3d 361, 364-65 (7th Cir. 2009); *Williams v. City of Champaign*, 524 F.3d 826, 827 (7th Cir. 2008); *Tibbs v. City of Chi.*, 469 F.3d 661, 662 (7th Cir. 2006); *Morfin v. City of E. Chi.*, 349 F.3d 989, 994-96 (7th Cir. 2003). In this case, however, Ms. Carlson did not advance a false arrest claim. In fact, she affirmatively disavowed any intention to assert a false arrest claim. *See* Appellant's Br. 22; Tr. at 20, May 18, 2009; Tr. at 4-6, June 5, 2009.

comport accurately with the governing legal principles.[20]

B.

The Section 1983 *Monell* Claim

Ms. Carlson also appeals the district court's dismissal of her *Monell* failure-to-train claim asserted against the City. However, because Ms. Carlson's section 1983 Fourth Amendment excessive force claim failed, her *Monell* claim failed as well. *See Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) ("[T]here can be no liability under *Monell* for failure to train when there has been no violation of the plaintiff's constitutional rights."); *Windle v. City of Marion, Ind.*, 321 F.3d 658, 663 (7th Cir. 2003) ("[A] plaintiff must prove that the individual officers are liable on the underlying substantive claim in order to recover damages from a municipality under [a theory of] . . . failure to train."). Accordingly, we affirm the district court's grant of summary judgment in favor of the City on the *Monell* claim.

C.

The District Court's Alleged Bias

Ms. Carlson contends that the district court was biased because it showed sympathy for Officer Bukovic when it referred to him as "this poor cop" during a

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[20] We review the rejection of a verdict form for abuse of discretion. *See Evans v. City of Chi.*, 513 F.3d 735, 741 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 899 (2009).

pretrial conference. *See* Appellant's Br. 45-47. Ms. Carlson does not specifically request a form of relief under this theory, but we assume she demands a new trial with a different presiding judge. Ms. Carlson, however, did not move for the district court's disqualification under 28 U.S.C. § 455. Although we have left open the question of "whether we may review a refusal to recuse under section 455(b) when the argument is raised for the first time on appeal," *United States v. Smith*, 210 F.3d 760, 764 (7th Cir. 2000), we need not resolve that issue today because recusal was unnecessary in this case.[21] The district court's off-the-cuff remark did not "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *In re Huntington Commons Assocs.*, 21 F.3d 157, 158 (7th Cir. 1994) (internal quotation marks omitted); *see also Hook v. McDade*, 89 F.3d 350, 354-56 (7th Cir. 1996) (describing the various forms of and bases for § 455 recusal). Our review of the entire record has assured us that the district court managed Ms. Carlson's case competently and fairly.

Ms. Carlson also appears to contend that the district court was biased and should have been removed pursuant to 28 U.S.C. § 144. However, Ms. Carlson concedes that she did not comply with the "procedural and substantive requirements" of § 144. *See United States v. Barnes*, 909 F.2d 1059, 1072 (7th Cir. 1990).

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[21] "[T]he denial of a request that the judge recuse himself under section 455(a) must be appealed immediately by application for writ of mandamus, or it is waived." *United States v. Horton*, 98 F.3d 313, 316 (7th Cir. 1996).

Conclusion

For the reasons stated in this opinion, we affirm the judgment of the district court.

AFFIRMED

9-2-10

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

September 2, 2010

BEFORE: KENNETH F. RIPPLE, Circuit Judge
DANIEL A. MANION, Circuit Judge
DIANE S. SYKES, Circuit Judge

No.: 09-2578	JUNE O. CARLSON, Plaintiff - Appellant v. SCOTT BUKOVIC, et al., Defendants - Appellees

Originating Case Information:

District Court No: 1:07-cv-00006
Northern District of Illinois, Eastern Division
Magistrate Judge Nan R. Nolan

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 07 C 06

[Filed June 9, 2008]

JUNE O. CARLSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Judge**
	)	**Nan R. Nolan**
SCOTT BUKOVIC and the	)	
CITY OF DARIEN, an Illinois	)	
Municipal Corporation,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff June O. Carlson filed suit against Officer Scott Bukovic and the City of Darien, Illinois, alleging unreasonable seizure in the nature of an assault and battery, and failure to train resulting in unreasonable seizure, all in violation of 42 U.S.C. § 1983. The parties have consented to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and have now filed cross-motions for summary judgment.

For the reasons set forth below, Plaintiff's motion is denied and Defendants' motion is granted in part and denied in part.

BACKGROUND[1]

Ms. Carlson ("June") lives in DuPage County, Illinois with her disabled adult son, Paul. (Def. Facts ¶¶ 1, 5.)[2] Officer Bukovic works as a police officer for the City of Darien. (*Id.* ¶¶ 2, 3.) During the course of his career, Officer Bukovic attended the Indiana State Academy, the Illinois State Police Academy, and a California police academy. He also worked with the Lake County, Indiana Sheriff's Department; the Westmont Police Department; and the California Highway Patrol before accepting the position with the Darien Police Department. (*Id.* ¶¶ 88, 89.)

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[1] Plaintiff's Local Rule 56.1 Statement of Material Facts essentially mirrors Defendants' Local Rule 56.1 Statement. Plaintiff's response to Defendants' 56.1 Statement, however, contains numerous denials and additional, contradictory facts. Notwithstanding Plaintiff's apparent concession as to the veracity of Defendants' version of events, the court has reviewed and considered all relevant factual statements and responses in addressing the cross-motions for summary judgment. *See Hardwood Line Mfg. Co. v. Whyco Technologies, Inc.*, No. 99 C 2467, 2000 WL 294832, at *8 n.8 (N.D. Ill. Mar. 21, 2000) ("[T]he Court, viewing all of the facts and reasonable inferences in a light most favorable to [the plaintiff], must consider the disputes raised by [the plaintiff's] properly supported denials of [the defendant's] statements of facts.")

[2] Defendants' Statement of Facts in Support of their Motion for Summary Judgment is cited as "Def. Facts ¶ __."

On January 3, 2005, June, who was then 83 years old, and Paul, who was 59 years old, went shopping at the Wal-Mart store in Darien, Illinois. Once at the store, the two separated to shop for their own items. (*Id.* ¶¶ 7, 8; Pl. Facts ¶¶ 1, 5.)[3] When Paul was finished, he started to look for his mother. As he was pushing his cart around the store, Paul brushed up against a fire hose box that had a sharp edge exposed on the bottom corner, and cut his arm. He went looking for a store manager to report the accident and found assistant manager Dale Hardiek. (*Id.* ¶¶ 8-10; Pl. Facts ¶¶ 8-10.) Paul told Hardiek about his injury and showed him the fire hose box. Hardiek escorted Paul to the personnel office located near the layaway area of the store and reported the incident to the personnel manager, Sue Katsaros. Hardiek then started to prepare an accident report, asking Paul to provide the relevant information. (*Id.* ¶¶ 10-12.)

By this time, someone had notified store co-manager, Brandon Hunter, about the incident, and he went to the personnel office. Paul told Hunter what happened but insisted on speaking to the store manager. Paul also wanted his mother with him to assist in communicating with Wal-Mart personnel. Paul is hard-of-hearing and was not wearing his hearing aids that day due to the damp weather. (*Id.* ¶¶ 13, 14; Pl. Facts ¶¶ 13, 14.) Katsaros paged June over the store's intercom system, contacted store manager Stacey Johnson, and then tried to administer first aid to Paul's cut. Paul, however, did not like the first aid kit because it was in a white plastic box that

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[3] Plaintiff's Statement of Facts in Support of her Motion for Summary Judgment is cited as "Pl. Facts ¶ __."

looked to him like "junk" and "a mess." (*Id.* ¶¶ 15, 16, 17; Paul Dep., Ex. C1, at 26-17; Katsaros Dep., Ex. E, at 23-24.)[4] Everyone present in the room agrees that Katsaros attempted to clean Paul's arm with iodine and that Paul objected because he is diabetic and allergic to it. Paul says Katsaros used it on his arm anyway; Katsaros denies this. Regardless, it is undisputed that Katsaros either offered or placed a Band-Aid on Paul's arm. (*Id.* ¶ 18; Pl. Fact Resp. ¶ 18.)[5]

A. June's Interaction with Wal-Mart Personnel

Shortly thereafter, June arrived in the personnel office and Paul told her what had happened. Katsaros also tried to explain the situation. (*Id.* ¶ 20.) Katsaros says that June was shocked and became upset and animated about the type of medical treatment Paul had received. Indeed, June later testified that the office was filthy and she was concerned that Paul's wound might become infected. (Pl. Add'l Facts ¶ 17.1.)[6] Katsaros was surprised by June's reaction to what she believed was a relatively minor cut that did not warrant calling an ambulance or require stitches. June and Paul insist that June remained calm while expressing concern about her son's injury. They also

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[4] Lettered exhibits are attached to Defendants' Statement of Facts.

[5] Plaintiff's Response to Defendants' Statement of Facts is cited as "Pl. Fact Resp. ¶ __."

[6] Plaintiff's Statement of Additional Facts is cited as "Pl. Add'l Facts ¶ __."

claim that the cut was actively bleeding and had rendered Paul "white as a ghost and shaking." (Def. Facts ¶¶ 19, 21, 22; Pl. Fact Resp. ¶¶ 19, 21, 22.)

At some point during this period, Stacey Johnson arrived in the personnel office. Hardiek was sitting at a table with Paul obtaining information about the incident for a store report. Paul had also been asked to complete a separate report describing the accident. Paul asked June to help him, but Johnson explained to June that store policy required that the statement be in Paul's own words. (*Id.* ¶¶ 23-25.) Johnson also told Katsaros, Hardiek and Paul that they needed to complete the reports in the layaway area.[7] According to Johnson, customers are not authorized to be in the personnel office (though they had all been there for approximately 20 minutes) because it was close to the employee locker area where there was often clothing and fixtures hanging from the ceiling. Johnson worried about liability issues if a customer were injured while in an unauthorized area. (*Id.* ¶ 26.)

Everyone proceeded to the layaway department, an area at the back of the store where customers can purchase items on layaway. The area is separated from the main shopping floor by a large 12- to 16-foot-wide opening. (*Id.* ¶ 28.) June stated that she wanted copies of all the documents that were being generated in connection with her son's injury. Katsaros says that June was still upset, becoming more so, and talking in a louder and louder voice. (*Id.* ¶ 29.) Johnson informed June that store policy only authorized the release of

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[7] Store co-manager Brandon Hunter had apparently left the office. (Def. Facts ¶ 27.)

Paul's written statement. By this time, Hardiek had returned to the sales floor because it was a busy time in Wal-Mart's shopping season. Paul started looking at Hardiek's report, but Johnson took it away from him. She wrote down the 800 number for the claims department, explaining that this department was responsible for determining which reports the Carlsons could have. (*Id.* ¶¶ 30-33.)

Katsaros says that June was upset and loud in the layaway department and could be heard for quite a distance. June disagrees, but she cites only to a page of her deposition transcript where she claimed to be "very calm" while in the personnel office. (*Id.* ¶ 34; Pl. Fact Resp. ¶ 34; June Dep., Ex. 5, at 27.)[8] In any event, it is undisputed that Paul left the layaway department because he wanted to be sure that Hardiek had taken a picture of the fire hose box. Paul found Hardiek placing foam and grey tape around the box as an immediate remedy. (*Id.* ¶ 35.)

When Paul returned to the layaway department, June was still asking questions about the incident and stated that she, too, wanted to see the fire hose box. The Carlsons, Johnson, and Hunter – who had proceeded to the layaway area by this time – all went back to look at the box. (*Id.* ¶ 36.) Everyone then returned to the layaway department so that Paul could complete his statement. The disagreement over which forms would be produced continued, and Paul started objecting that he wanted to complete his report in the

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[8] Numbered exhibits are attached to Plaintiff's Response to Defendants' Statement of Facts.

personnel office where there was a place for him to sit down. (*Id.* ¶¶ 37, 38; Pl. Fact Resp. ¶ 38.)

According to Hunter, Paul and June both continued to act "disorderly" and to overreact to the situation. In addition, June kept interfering while Paul was preparing his statement. June disagrees with this assessment, claiming the interaction was "amicable," that she used "no harsh words," and that it was Johnson who interfered with her son's effort to complete his statement by saying uncomplimentary things and threatening to take the statement away. (*Id.* ¶¶ 39, 40; Pl. Fact Resp. ¶¶ 39, 40; June Dep., Ex. 5, at 35; Pl. Add'l Facts ¶ 39.1; Def. Add'l Facts Reply ¶ 39.1.)[9]

B. Paul's Confrontation with Johnson

Paul had apparently obtained a chair for himself by this point, and though he was unable to hear what Johnson was saying to June throughout this time, he stood up at some point and told Johnson in a firm voice, "Don't you talk that way to my mom." (*Id.* ¶ 41.) Here, again, there is disagreement as to what

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[9] Defendants' Reply to Plaintiff's Statement of Additional Facts is cited as "Def. Add'l Facts Reply ¶ __." Throughout this reply, Defendants repeatedly object that June's testimony is "self-serving as it contradicts the overwhelming evidence to the contrary by non-party, unbiased witnesses and, therefore, should be stricken." The cases Defendants cite, however, address affidavits. *See, e.g., Nedzvekas v. LTV Copperweld*, 356 F. Supp. 2d 904, 908 (N.D. Ill. 2005) ("[S]elf-serving statements contained in an affidavit will not defeat a motion for summary judgment when those statements are without factual support.") (internal quotations omitted). To the extent Plaintiff has cited only to deposition testimony, these cases are inapplicable.

occurred. Paul says that he could tell that Johnson was "mean" to his mother. (Paul Dep., Ex. 6, at 49.) He also claims that Johnson was standing behind a counter at the time, and he stepped towards her but did not go behind the counter himself. Johnson, in turn, stepped back. (*Id.* at 52-53.) June adds that Johnson was angry that Paul had spoken firmly to her. (Pl. Add'l Facts ¶ 41.2.)

Johnson says that Paul pointed his finger at her and stepped towards her while she was in front of the counter. In fact, she insists that she could not step back from Paul because the counter was behind her. (Johnson Dep., Ex. G, at 44.) It is undisputed that Paul is a relatively big man, and that Johnson is not very tall. (Def. Facts ¶ 42.) According to Johnson, she felt threatened and told Paul, "Please step back. I feel threatened." (Johnson Dep., Exs. G and G1, at 39-40, 89-90.) Johnson claims that June responded, "We're not threatening you," but that she affirmed, "No, I feel threatened. Please step back. I will call the police and have you escorted out." (*Id.* at 40, 89-90.)

At this point, Johnson says, she was able to move through an opening in the counter and get behind it. Johnson remained fearful, however, because Paul made another move towards her as they were discussing which forms could be copied. Johnson again told Paul that she felt threatened and asked him to step back. Paul may or may not have stepped back at this point, but Johnson certainly did. (*Compare* Johnson Dep., Ex. G, at 44-46; Def. Facts ¶ 45 *with* Def. Add'l Facts Reply ¶ 42.1.) Johnson believed that the situation was escalating beyond her control, and either she or another Wal-Mart employee called the police. (Def. Facts ¶¶ 46, 48.)

C. Officer Bukovic's Arrival

Officer Scott Bukovic and Officer Richard Stutte arrived at the store around 4:52 p.m. after receiving the call that a male and female were being loud or argumentative. (*Id.* ¶ 49.) Officer Bukovic, the primary responding officer, and Officer Stutte, the back-up officer, both responded to the layaway department where they found the Carlsons, Johnson and Hunter. (*Id.* ¶ 50.) Officer Bukovic found June to be calm at this time, and asked Johnson to explain what had happened up to this point. Johnson responded that Paul had injured himself at the store, and told Officer Bukovic that during the more than one-hour process of completing a report, Paul had become very loud and boisterous towards Johnson and pointed a finger at her, making her feel threatened. (Def. Facts ¶ 51; Bukovic Dep., Ex. J, at 44-46; Pl. Facts ¶ 50.1.)

While Johnson was speaking, June kept interrupting her. (*Id.* ¶ 52.) At one point, June made a gesture to get Officer Bukovic's attention, but he turned to her and said, "Hold on a minute. Please don't touch me. Just let this (sic) finish and then we'll move on" or "then we'll talk to you." (*Id.*) June insists that initially, she did not interrupt Johnson. It was only after Johnson accused Paul of threatening her that June started loudly protesting and challenging the statement, at which point Johnson stated that she "felt" threatened by him. (Pl. Fact Resp. ¶ 52; Pl. Add'l Facts ¶¶ 52.1, 52.2.) June was admittedly "surprised" at Johnson's accusation, and Johnson and Bukovic both recall that June called Johnson a liar at least twice. (Def. Facts ¶ 53.) Officer Bukovic explained to June that he needed to hear Johnson's version of the

story first and would then get June's version. (*Id.* ¶ 54.)

Officer Bukovic next spoke to Paul, who explained how he had received a cut on his arm. Officer Bukovic went out to the sales floor and personally examined the fire hose box at issue. (Def. Facts ¶ 55.) Paul also told Officer Bukovic that he is hard of hearing and has difficulty speaking. According to Officer Bukovic, Paul was adamant, vocal and loud, and he used hand gestures to explain his situation. When Officer Bukovic told Johnson about Paul's hearing problem, she expressed surprise but still maintained that she felt threatened by him. Officer Bukovic found Johnson to be credible in that regard. (*Id.* ¶ 56.)

D. Officer Bukovic's Interaction with June

The parties offer entirely different versions of what occurred next. Officer Bukovic says that he asked June to explain what happened, but all she wanted to do was discuss how Johnson was a liar. June was loud and boisterous such that everyone could hear her. (*Id.* ¶ 57.) As a result, Officer Bukovic asked June for her driver's license so that he could determine who he was dealing with. June asked why she had to provide a driver's license seeing as how she was not involved in the incident. Officer Bukovic relayed this exchange to Johnson, who stated that Paul could stay and complete his report but that June had to leave the store because she was being disruptive. (*Id.* ¶¶ 58, 59; Pl. Add'l Facts ¶ 58.1.) Officer Bukovic says that he told June that Wal-Mart management wanted her to leave the store and advised her that he could arrest her for trespass if she refused. June stated that "this was crazy" and refused to leave. Officer Bukovic tried three or more

times to convince her to leave, but she refused. (*Id.* ¶¶ 59, 60.)

At this point, according to Officer Bukovic and Katsaros, Officer Bukovic reached for June's right arm and placed one hand on her forearm and one hand on her upper arm. He touched June in a calm, escorting gesture in an attempt to guide her out of the store. Officer Stutte likened the action to one taken to assist a mother or grandmother in a parking lot in inclement weather. (*Id.* ¶ 61.) June, however, "freaked out" and began flailing her arms and yelling "let go of me!" or "don't touch me!" Officer Bukovic grabbed both of her arms in an attempt to prevent her from striking him and to calm her down. June had put her hands up and crossed her arms in front of her chest, causing her arms to be pushed and pulled against her chest in the fray. (*Id.* ¶ 62.) Officer Bukovic claims that he held onto June for no more than five seconds. He never placed her under arrest and never told her that she had to remain in the store; to the contrary, everyone wanted her to leave. (*Id.* ¶ 64.) June finally settled down physically when Paul went to assist her and told her that she should just leave the store. (*Id.* ¶ 63; Paul Dep., Ex. 6, at 82-83.)

June insists that Officer Bukovic never asked for her version of events. Instead, Johnson motioned to Officer Bukovic that she wanted June arrested or removed from the store, at which point Officer Bukovic began demanding June's purse. According to June, Officer Bukovic gestured that he was going to grab June and/or her purse and she kept backing away from him. This made Officer Bukovic very angry and hostile. (Pl. Fact Resp. ¶ 58; Pl. Add'l Facts ¶ 58.1.) June says that Officer Bukovic grabbed her arms,

which were crossed at her chest, and she placed them upwards as if to defend herself from an attack. Officer Bukovic then repeatedly "banged" June's wrists against her chest, neck and throat area while kicking at her legs and hitting her once in the groin. (*Id.*; Pl. Add'l Facts ¶ 58.5.) June claims that Officer Bukovic threatened to handcuff her and she kept exclaiming, "Don't touch me!" and screaming for help. Paul came to her assistance, supported her so that she would not fall, and threatened Officer Bukovic with a lawsuit if he did not let go of his mother. Officer Bukovic finally released June, at which point, she says, she was ready to faint and exceedingly white. (*Id.*; Pl. Add'l Facts ¶ 58.7.)

The parties agree that someone brought a wheelchair for June and that Paul obtained permission from Officer Bukovic to get her a cup of water. (Def. Facts ¶ 64; Def. Add'l Facts Reply ¶ 58.11.) Paul claims, however, that as he was filling the cup, Officer Bukovic placed his hand on his service revolver after unlocking the holster. (Pl. Fact Resp. ¶ 58.) Officer Bukovic claims that June declined his offer of medical treatment, but it is undisputed that she went to the Hinsdale Hospital emergency room after she left the store – and after she first made stops at home to change out of her soiled clothing (she urinated in her clothes), and at the Hinsdale police department. (Def. Facts ¶ 65; Pl. Fact Resp. ¶¶ 63, 65; Pl. Add'l Facts ¶ 63.1; Def. Add'l Facts Reply ¶ 63.1.)

E. Post-Encounter Events

Once June was seated in the wheelchair, Officer Bukovic returned to an assertion Paul had made about suing Wal-Mart. Officer Bukovic explained that Paul

could contact Wal-Mart's corporate headquarters to make a complaint, and he gave Paul his name and report number to use as a reference. (Def. Facts ¶ 66.) Officer Bukovic also told Paul that Wal-Mart wanted his mother to leave the store. Paul agreed to take her outside and pushed her in the wheelchair to his truck, with the two officers in tow. (*Id.* ¶ 67.) Paul returned to the store to complete his statement and Officer Bukovic gave him a copy of it. At Johnson's request, Officer Bukovic also gave Paul a "Notification of Restriction from Property" stating that the Carlsons were not permitted to return to the Wal-Mart store. Paul refused to sign it. He purchased the items he and his mother had gathered in their carts and then wheeled them out to the truck. (*Id.* ¶¶ 68, 69.) Officer Bukovic asked if he could accompany Paul to make sure June was okay, but Paul refused. (*Id.* ¶ 70.)

The next day, on January 4, 2005, June telephoned the Darien Police Department to lodge an excessive force complaint against Officer Bukovic. Sergeant Falco investigated the claim by conducting telephone interviews with June, Stacey Johnson and Officer Bukovic. Given the seriousness of the charge, Sergeant Falco advised June that she would also need to complete a written statement. (*Id.* ¶¶ 74, 75, 78-80, 82.) June said that she could not provide one until she felt better. (*Id.* ¶ 81.) Over the next few weeks, Sergeant Falco attempted several times to secure a written statement from June, even offering to go to her house. June repeatedly refused. (*Id.* ¶¶ 84-86.) Finally, on April 4, 2005, Sergeant Falco recommended that the investigation be closed and that Officer Bukovic be exonerated. On April 13, 2005, Deputy Chief David Skala wrote a letter to June advising her of this result. (*Id.* ¶¶ 86, 87.)

F. June's Lawsuit

On January 3, 2007, June and Paul filed suit against Officer Bukovic, the City of Darien, and Wal-Mart Stores, Inc., Wal-Mart Associates, Inc., Wal-Mart Stores East, Inc., and Wal-Mart Realty Company (collectively, "Wal-Mart"), alleging violations of § 1983 (Counts I through IV) and state law claims for negligence, assault, battery, and intentional infliction of emotional distress (Counts V through VIII). On June 19, 2007, the court dismissed Count II (titled "42 U.S.C. § 1983: Unreasonable Seizure Inflicting Severe Emotional Distress") and Count IV (titled "42 U.S.C. § 1983: Failure to Train Resulting in Unreasonable Seizure in the Nature of Infliction of Severe Emotional Distress") for failure to state claims. The court also dismissed Counts VI through VIII by agreement of the parties. (Minute Order of 6/19/07, Doc. 35.)

Shortly thereafter, on October 1, 2007, the court dismissed the sole count asserted against Wal-Mart (Count V), finding the state law negligence claim substantially different from the federal claims asserted against Officer Bukovic and the City of Darien, and declining to exercise supplemental jurisdiction. (Minute Order of 10/1/07, Doc. 44.) Thus, there are two remaining claims at issue: (1) Count I (titled "42 U.S.C. § 1983: Unreasonable Seizure in the Nature of Assault & Battery") asserted by June against Officer Bukovic; and (2) Count III (titled "42 U.S.C. § 1983: Failure to Train Resulting in Unreasonable Seizure in the Nature of Assault & Battery") asserted by June against the City of Darien.

DISCUSSION

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). When considering cross-motions for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion under consideration. *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001). The court's function in ruling on a motion for summary judgment is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Where factual matters are in dispute, the court is required to credit the nonmovant's version of events. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 802 (7th Cir. 2000). The nonmoving party must do more, however, than demonstrate a factual dispute; she must offer evidence sufficient to support a verdict in her favor. *Basith v. Cook County*, 241 F.3d 919, 926 (7th Cir. 2001).

Plaintiff claims that Officer Bukovic seized her unreasonably in violation of § 1983 and her due process rights, and that the City of Darien is liable for Officer Bukovic's actions due to its failure to train him, also in violation of § 1983. In her memorandum in support of summary judgment, Plaintiff additionally raises the issue of whether Officer Bukovic had probable cause to arrest her. (Pl. Mem., at 3-4.) The Complaint does not allege a claim for false arrest, however, and the parties agree that Plaintiff was *not* arrested. (Pl. Facts ¶ 64; Def. Fact Resp. ¶ 64.) To the

extent Plaintiff is attempting to insert a new false arrest claim into the case, it will not be considered. *See Killis v. Medieval Knights, LLC*, No. 04 C 6297, 2007 WL 4302470, at *3 (N.D. Ill. Dec. 4, 2007) (court "would not consider a wholly new claim introduced in response to Defendant's motion for summary judgment."); *Davis v. Harris*, No. 03-3007, 2006 WL 3321630, at *37 n.22 (C.D. Ill. Nov. 14, 2006) (plaintiff "does not allege these retaliatory acts in the Complaint and cannot amend his claims through his summary judgment brief.")

Thus, the court addresses Plaintiff's Fourth Amendment, due process and failure to train arguments below.

I. The Fourth Amendment

A. Seizure

The parties first dispute whether Officer Bukovic effected a seizure of June on January 3, 2005. The Fourth Amendment – which is made applicable to the states by the Fourteenth Amendment – protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV; *Jewett v. Anders*, 521 F.3d 818, 820-21 (7th Cir. 2008); *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). A Fourth Amendment seizure occurs whenever a police officer "by means of physical force or show of authority . . . in some way restrain[s] the liberty of a citizen . . . ." *Acevedo v. Canterbury*, 457 F.3d 721, 724 (7th Cir. 2006) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). As the Supreme Court recently explained, a seizure occurs if "in view of all of the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Where physical force is involved, a seizure occurs "[w]henever an officer restrains the freedom of a person to walk away." *Acevedo*, 457 F.3d at 724 (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)).

Defendants argue that no seizure occurred here because Plaintiff at all times remained free to walk away – in fact, Officer Bukovic and Wal-Mart personnel wanted her to leave the store. (Def. Mem., at 3.) Defendants agree that police officers do not have a right to "shove, push, or otherwise assault innocent citizens without any provocation whatsoever." (*Id.* at 4 (citing *Clash v. Beatty*, 77 F.3d 1045, 1048 (7th Cir. 1996) (citation omitted)). They stress, however, that even some unreasonable, unjustified or outrageous conduct "may simply violate state tort law or indeed may be perfectly legal, though unseemly and reprehensible." *Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir. 1994).

In *McCoy v. Harrison*, 341 F.3d 600 (7th Cir. 2003), for example, an animal welfare investigator for the Illinois Department of Agriculture went to the plaintiff's property to inspect her dog kennels. As the investigator attempted to open one of the kennel gates, the plaintiff reached with her hand to slam the gate shut. *Id.* at 603. At that point, the investigator backhanded her on the face. The plaintiff fell to the ground, and when she looked up, the investigator was standing over her and was digging his hand into her arm. He then "let me go and just walked . . . back down the driveway." *Id.* The Seventh Circuit held that these

actions did not constitute a seizure. The court explained, "[w]hile [the investigator's] actions may have caused [the plaintiff] injury, there is no evidence to show he intended to or did acquire physical control over her person." *Id.* at 606. *See also McKeown v. Hairston*, No. 05-73244, 2007 WL 1768767, at *2 (E.D. Mich. June 15, 2007) (no seizure occurred where police officer used deliberate physical force to shove the plaintiff out of the way, causing her to fall to the ground, but did not give any indication that she was not free to leave).

Plaintiff argues that Officer Bukovic seized her "[b]y taking hold of her, refusing her demand to release the initial hold and grasping her even more strongly." (Pl. Mem., at 3.) In Plaintiff's view, Officer Bukovic "denied her the liberty to leave the lay-a-way room for any other part of the Walmart store other than the 'Exit,'" and she was not able to "go about her business of aiding her son in filling out an accident report or to continue going about her shopping business in the Wal-mart store." (Pl. Resp., at 2, 3.)

The court agrees with Defendants that no seizure occurred at any time prior to or after the physical encounter between Plaintiff and Officer Bukovic. Throughout that period, Plaintiff remained free to leave the Wal-Mart store and go anywhere else she desired. *Cf. Brendlin*, 127 S. Ct. at 2405 (seizure occurs when "a reasonable person would have believed that he was not free to leave.") As Defendants note, Officer Bukovic and Wal-Mart personnel affirmatively *wanted* her to leave. The mere fact that Plaintiff apparently wanted to stay in the store does not make Officer Bukovic's actions during this time a "seizure." *See Sheppard v. Beerman*, 18 F.3d 147, 153 (2d Cir.

1994) (no seizure where fired law clerk was escorted out of the courthouse by court officers; law clerk was "free to go anywhere else that he desired," except the judge's chambers and the courthouse). Defendants' motion for summary judgment on the seizure claim is granted as to all non-physical interactions between Plaintiff and Officer Bukovic.

With respect to the physical encounter, on the other hand, summary judgment is not appropriate for either party. Viewing the facts in a light most favorable to Plaintiff, Officer Bukovic used physical force when he grabbed her and banged her arms against her neck, throat and chest, kicked her in the legs and kneed her in the groin. According to Plaintiff, Officer Bukovic was angry because she refused to give him her purse, and he threatened to place her in handcuffs. In addition, he only released his grip on Plaintiff when Paul came over and threatened him with a lawsuit.[10] The Supreme Court has noted that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). While Officer Bukovic had a hold on Plaintiff's arms, she arguably was not free to leave and her

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[10] Defendants suggest that Plaintiff's version of events is so incredible that the court should reject it as a matter of law. (Def. Mem., at 12.) *See also Seshadri v. Kasraian*, 130 F.3d 798, 802 (7th Cir. 1997) ("[T]estimony can and should be rejected without a trial if, in the circumstances, no reasonable person would believe it.") Even accepting that Plaintiff's statements suffer from an air of implausibility, "[q]uestions of witness credibility typically rest with the jury, not the court." *United States v. Scott*, 145 F.3d 878, 883 (7th Cir. 1998). *See also Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 827 (N.D. Ill. 2002).

movement was restrained. *See Maryland v. Wilson*, 519 U.S. 408, 420 n.8 (1997) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest."); *Acevedo*, 457 F.3d at 724 ("The fact that the restraint on the individual's freedom of movement is brief makes no difference.")

Similarly, viewing the facts in a light most favorable to Defendants, a reasonable jury could conclude that no seizure occurred at all. Johnson instructed Officer Bukovic that Plaintiff needed to leave the store because she was being disruptive, and Officer Bukovic relayed this information back to Plaintiff. Plaintiff ignored no fewer than three requests by Officer Bukovic that she leave, after which he placed one hand on Plaintiff's right forearm and one hand on her upper arm in a calm, escorting gesture designed to guide her out of the store. *See, e.g.*, *Acevedo*, 457 F.3d at 725 ("Certain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a 'seizure' for Fourth Amendment purposes.") Plaintiff, however, "freaked out" and began flailing her arms and yelling, prompting Officer Bukovic to grab both of her arms – for no more than five seconds – in an attempt to prevent her from striking him and to calm her down.

There is a question of fact as to the nature of the physical interaction between Plaintiff and Officer Bukovic and, thus, summary judgment is not appropriate to either party on this portion of Plaintiff's claim that she was seized in violation of the Fourth Amendment.

B. Reasonableness

Assuming Plaintiff is able to establish that a Fourth Amendment seizure occurred, there is also a question of fact as to whether Officer Bukovic's conduct was objectively reasonable. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir. 2007) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). This analysis is "not capable of precise definition or mechanical application," and the court must examine the "'totality of the circumstances' surrounding the incident." *Id.* (quoting *Garner*, 471 U.S. at 8-9). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (quoting *Graham*, 490 U.S. at 396). Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Johnson v. LaRabida Children's Hosp.*, 372 F.3d 894, 898 (7th Cir. 2004).

Defendants insist that Officer Bukovic's conduct was reasonable, noting testimony that (1) he was called to the Wal-Mart store for a disturbance involving a male and female; (2) June kept interrupting Officer Bukovic while he was trying to hear Stacey Johnson's version of events; (3) Plaintiff's voice was raised, and she was loud, boisterous and uncooperative; (4) Officer Bukovic asked Plaintiff to leave three or more times but she refused; (5) when

Officer Bukovic attempted to gently escort Plaintiff from the premises, she "freaked out," began flailing her arms and yelling; and (6) Officer Bukovic held onto Plaintiff's arms for no more than five seconds; and (7) he offered her medical attention afterwards, which she declined. (Def. Resp., at 11-12.)

As discussed earlier, however, Plaintiff's version of events is entirely different. She claims that (1) she was calm when dealing with Wal-Mart personnel, and her interaction with Johnson was "amicable"; (2) Officer Bukovic gestured that he was going to grab her and/or her purse and she kept backing away from him; (3) Officer Bukovic became angry and hostile and grabbed her arms, which were crossed at her chest, and she placed them upwards as if to defend herself from an attack; (4) Officer Bukovic repeatedly "banged" her wrists against her chest, neck and throat area while kicking at her legs and hitting her once in the groin; (5) Officer Bukovic threatened to handcuff her; (6) Officer Bukovic only released her after Paul threatened him with a lawsuit; and (7) Officer Bukovic's actions caused her to urinate in her clothes and sustain a variety of injuries including bruises, numbness, aggravated high blood pressure, and head, mouth and jaw pain.[11] (June Dep., Ex. 5, at 105-06.)

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[11] Plaintiff's additional arguments that the seizure was unreasonable because Officer Bukovic had no probable cause to arrest her for trespass or disorderly conduct are misplaced. (Pl. Mem., at 3-4; Pl. Reply, at 5-10.) As noted, Plaintiff has not stated a claim for false arrest and, thus, any purported lack of probable cause to arrest her for those crimes is irrelevant to her claim of unlawful seizure by use of excessive force in the nature of assault and battery. *See Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 681 (7th Cir. 2007) (citing *Lenard v. Argento*, 808 F.2d 1242,

Again viewing the facts in a light most favorable to Plaintiff, a jury could reasonably conclude that Officer Bukovic's conduct during his physical interaction with June was not reasonable under the circumstances. At the same time, viewing the facts in a light most favorable to Defendants, a reasonable jury could conclude that Officer Bukovic's conduct during his physical interaction with Plaintiff was entirely reasonable under the circumstances. Both parties' requests for summary judgment on this basis are denied.

II. The Fourteenth Amendment

Plaintiff's Complaint does not set forth a separate count for relief under the Fourteenth Amendment, but Count I includes the following allegation: "Such conduct by Defendant BUKOVIC violated the right of JUNE O. CARLSON under the Fourth and Fourteenth Amendments of the United States Constitution to be free from unreasonable seizure and to receive due process of law." (Cmplt. ¶ 34.) Plaintiff does not mention the Fourteenth Amendment in her motion for summary judgment; Defendants, however, have argued extensively that in the event a jury finds that Plaintiff was not seized within the meaning of the Fourth Amendment, she cannot prevail on her alternate claim for violation of substantive due process rights under the Fourteenth Amendment. (Def. Mem., at 6-10 (citing *Schaefer v. Goch*, 153 F.3d 793, 797 (7th Cir. 1998)) (where plaintiffs were not seized by police

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1246 (7th Cir. 1987) ("False arrest and excessive force are unrelated except in forming a sequence. . . . evidence showing one form of misconduct is not relevant to establishing the other."))

officers, they could recover only "by way of the Fourteenth Amendment's protection of substantive due process.")

Plaintiff barely responds to Defendants' arguments, stating only that: "the conduct of Officer Bukovic . . . against an octogenarian female does 'shock the conscience' when applying the rule that disputed facts shall be taken in a light most favorable to the non-moving party." (Pl. Resp., at 2.) The court nevertheless will address the claim. *See Davis v. Carter*, 452 F.3d 686, 691-92 (7th Cir. 2006) (plaintiff did not waive *Monell* claim by submitting "perfunctory and undeveloped" arguments where those arguments "depended entirely on the application of facts to the well-established *Monell* legal standard already presented in the defendants' brief.")

The Fourteenth Amendment due process guarantee protects "the individual against arbitrary action of government." *Schaefer*, 153 F.3d at 797. "Typically, an individual's Fourteenth Amendment due process rights are violated only if a government official's actions display a deliberate indifference to life or liberty that 'shocks the conscience.'" *Mandis v. City of Belleville*, No. 05-CV-642-DRH, 2006 WL 3487637, at *3 (S.D. Ill. Dec. 4, 2006) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)). Negligence is not sufficient to meet the "shocks the conscience" standard. It requires "conduct intended to injure in some way unjustifiable by any government interest." *Foreman v. Johnson*, No. 03 C 187, 2006 WL 2714936, at *7 (N.D. Ill. Sept. 20, 2006) (quoting *Lewis*, 523 U.S. at 849). As the Supreme Court has explained, "only the most egregious conduct may be condemned under [this] approach." *Christensen v. County of Boone, IL*, 483

F.3d 454, 464 (7th Cir. 2007) (quoting *Lewis*, 523 U.S. at 846). "[T]he parameters of what constitutes violation of one's substantive due process rights is fluid and demands a case-by-case analysis of the facts." *Foreman*, 2006 WL 2714936, at *7 (quoting *Lewis*, 523 U.S. at 849).

Defendants argue that the facts of this case are analogous to those presented in *Slusher v. Carson*, 488 F. Supp. 2d 631 (E.D. Mich. 2007), in which deputies arrived on the plaintiffs' property with a warrant to search their barns for some tractors belonging to their neighbor. *Id.* at 634-35. The husband agreed to the search, but when his wife arrived and reviewed the court order, she objected. She also refused to give the court order back to the deputy, and when he reached for it, she raised her hand in the air away from his grasp. *Id.* at 635. The deputy responded by pulling her arm down with one hand, and using his other hand to grab her right hand. He allegedly pressed his thumb into her hand and palm, squeezed the back of her hand, and twisted her fingers back and around. *Id.* at 635-36. Due to a preexisting condition, the plaintiff lost the use of her hand for several months, and suffered impaired range of motion in the hand and drastic loss of grip strength and fine motor skills. *Id.* at 636.

The district court held that this encounter did not violate the plaintiff's Fourteenth Amendment due process rights. In the court's view, the incident "more closely resembles those situations where officers must act in rapidly evolving, fluid, and [potentially] dangerous predicaments." *Id.* at 640. The force the deputy applied to the plaintiff's hand in an attempt to retrieve the paperwork was not "applied maliciously

and sadistically for the very purpose of causing harm." *Id.* Nor did the deputy's actions evidence "deliberate indifference" to the plaintiff's rights such as to be "conscience shocking." *Id.* The court thus granted summary judgment in favor of the deputy.

In this case, Plaintiff admits that she refused to leave the Wal-Mart store despite being asked; Officer Bukovic was called to respond to a disturbance involving a male and a female patron; Plaintiff loudly protested and challenged Johnson's version of events; Plaintiff refused to turn over her purse – or any identification – to Officer Bukovic upon request; and Plaintiff backed away from him. At this point, Plaintiff says Officer Bukovic became hostile and angry and he then grabbed for her and/or her purse, banged her arms, kicked her, kneed her in the groin and threatened to handcuff her. The court agrees with Defendants that Officer Bukovic was reacting to a rapidly evolving, fluid situation when he reached for Plaintiff and/or her purse to obtain identification. *See Lewis*, 523 U.S. at 853 ("[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'")

Even assuming a jury credits Plaintiff's version of the subsequent events, moreover, Officer Bukovic's actions did not rise to the conscience-shocking level necessary to implicate the Fourteenth Amendment. Plaintiff acknowledges that Officer Bukovic was attempting to obtain her purse and/or identification in response to a disturbance call, and there is no evidence that he approached her with an intent to cause her

injury. *See Bublitz v. Cottey*, 327 F.3d 485, 491 (7th Cir. 2003) ("[C]onduct *intended* to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.") (internal quotations omitted). To be sure, Officer Bukovic's actions may constitute assault or battery under state tort law, but "[t]he 'shocks the conscience' standard works to distinguish the due process guarantee from traditional standards of tort liability, so that the Fourteenth Amendment does not become a 'font of tort law.'" *Christensen*, 483 F.3d at 462 n.2.

The Supreme Court has stressed that "it is *a constitution* we are expounding," and "the Due Process Clause was intended to prevent government officials . . . from abusing [their] power, or employing it as an instrument of oppression." *Lewis*, 523 U.S. at 846 (internal quotations and citations omitted). Plaintiff has not demonstrated that Officer Bukovic acted deliberately to harm her and, thus, Defendants' motion for summary judgment on Plaintiff's Fourteenth Amendment claim is granted. *Christensen*, 483 F.3d at 464 ("[O]nly the most egregious conduct may be condemned under" the Fourteenth Amendment).

III. Qualified Immunity

Defendants argue that Officer Bukovic is nonetheless entitled to qualified immunity for his actions on January 3, 2005. Qualified immunity "serves to protect those public officials who have violated a constitutional right when the contours of that right were not sufficiently clear at the time to enable a reasonable official to know that his conduct was prohibited." *Holmes v. Village of Hoffman Estate*,

511 F.3d 673, 687 (7th Cir. 2007). The doctrine recognizes that "[i]t is sometimes difficult for an officer to determine how [a particular] legal doctrine . . . will apply to the factual situation the officer confronts." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The Supreme Court has articulated a two-part test for qualified immunity: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the alleged violation. *Chelios v. Heavener*, 520 F.3d 678, 2008 WL 746842, at *9 (7th Cir. Mar. 21, 2008) (citing *Saucier*, 533 U.S. at 201).

Having found a question of fact as to whether Officer Bukovic violated Plaintiff's Fourth Amendment rights during their physical encounter, the only question here is whether those rights were clearly established at the time of the alleged violation. The court first rejects Plaintiff's assertion that the relevant "clearly established" right relates in any way to the Illinois statutes governing disorderly conduct and trespass. (Pl. Reply, at 11-12.) Even assuming that Plaintiff was not in violation of either statute while on Wal-Mart's property, she has not cited any cases, nor is the court aware of any, suggesting that a store patron has a constitutional right to be free from police interference when the owner wants her to leave the premises and requests police assistance, but the patron has not engaged in criminal conduct.

The relevant right in this case is an individual's right to be free from unreasonable seizure or the use of excessive force. Plaintiff can defeat Officer Bukovic's qualified immunity defense by "(1) pointing to a closely analogous case that established a right to be free from

the type of force [Officer Bukovic] used on h[er]; or (2) showing that the force was so plainly excessive that, as an objective matter, [Officer Bukovic] would have been on notice that [he was] violating the Fourth Amendment." *Chelios*, 2008 WL 746842, at *10 (quoting *Clash*, 77 F.3d at 1048).

Defendants argue that "[r]easonable officers in Officer Bukovic's position would not have known that placing his arms on a store patron in an effort to remove her from a store after requesting her to leave several times violated a clearly established constitutional right of Plaintiff." (Def. Resp., at 14.) Based on Defendants' version of events, the court agrees. Once again viewing the facts in a light most favorable to Plaintiff, however, the court finds that a reasonable officer attempting to obtain a patron's purse or escort her out of a store would have known not to repeatedly "bang" an 80-year-old woman's arms against her neck, throat and chest, and kick her and knee her in the groin, particularly where the patron claims that she did nothing to provoke that level of attack. *See, e.g., Chelios*, 2008 WL 746842, at *9 (quoting *Smith v. City of Chicago*, 242 F.3d 737, 742 (7th Cir. 2001)) (to demonstrate that a constitutional right was clearly established, a plaintiff may show that "'the conduct is so egregious that no reasonable person could have believed that it would not violate clearly established rights.'") To this extent, Defendants' motion for summary judgment on the basis of qualified immunity is denied.

IV. Failure to Train

Count III of the Complaint asserts a § 1983 claim against the City of Darien for failure to train

adequately Officer Bukovic, resulting in the violation of Plaintiff's constitutional rights. "A municipality may be held liable under § 1983 for constitutional violations caused by the municipality itself through its own policy or custom." *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007). As noted, there is a question of fact as to whether Officer Bukovic violated Plaintiff's Fourth Amendment rights during their physical encounter. If not, the City cannot be liable. *Id.* ("[T]here can be no liability under *Monell* for failure to train when there has been no violation of the plaintiff's constitutional rights.") *See also Windle v. City of Marion, Ind.*, 321 F.3d 658, 663 (7th Cir. 2003) ("[A] plaintiff must prove that the individual officers are liable on the underlying substantive claim in order to recover damages from a municipality under . . . failure to train.")

Assuming Officer Bukovic did violate Plaintiff's Fourth Amendment rights, the City may only be held liable for the violation if the inadequacy in training amounts to deliberate indifference to those rights. "Proof of deliberate indifference requires more than '[a] showing of simple or even heightened negligence.'" *Id.* (quoting *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997)). Courts find deliberate indifference on the part of policymakers "only when such indifference may be considered a municipal policy or custom." *Id.* A municipality acts with deliberate indifference when (1) "'in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights,' that the deficiency exhibits deliberate indifference on the part of municipal policymakers"; or (2) "a repeated pattern of

constitutional violations makes 'the need for further training . . . plainly obvious to the city policymakers.'" *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 and n.10 (1989)).

Plaintiff's primary evidence in support of her failure to train claim involves the Darien police force's alleged lack of training regarding a specific provision of the Illinois Criminal Trespass statute, 720 ILCS 5/21-3. (Pl. Resp., at 4-5.) Plaintiff stresses that this provision allows an individual to remain in a lawfully entered building that is open to the public during normal business hours. To the extent Plaintiff has not stated a claim for false arrest based on any alleged criminal trespass, however, this statute – and Officer Bukovic's knowledge of it – has no bearing on whether he "seized" Plaintiff, or the reasonableness of his physical encounter with her.

Plaintiff does not dispute the extent of Officer Bukovic's training both before and during his employment with the Darien Police Department. As Defendants note, Officer Bukovic attended three separate police academies in Indiana, Illinois and California, graduating at the top of his class from his most recent six-month program with the California Highway Patrol. (Def. Facts ¶ ¶ 88, 89.) Officer Bukovic also worked and trained with several police departments, including the Lake County, Indiana Sheriff's Department, the Westmont Police Department, the California Highway Patrol and, finally, the Darien Police Department. He went through the Darien Police Department field training program, including about 16 weeks of on-the-job training plus a written exam regarding the "use of

force." It is undisputed that Officer Bukovic passed the program and the exam. (*Id.* ¶¶ 88-90.)

More importantly, Plaintiff has not offered any evidence indicating that the training given to Officer Bukovic and other Darien officers was constitutionally infirm. Nor does she explain how the training he received specifically in the area of excessive force was inadequate. The Seventh Circuit has made clear that "[i]n determining the adequacy of training, the focus must be on the program, not whether particular officers were adequately trained." *Palmquist v. Selvik*, 111 F.3d 1332, 1345 (7th Cir. 1997). *See also Quade v. Kaplan*, No. 06 C 1505, 2008 WL 905187, at *14 (N.D. Ill. Mar. 31, 2008). In this regard, Plaintiff directs the court to three documents, none of which suffices to defeat summary judgment.

The first document is Officer Bukovic's May 15, 2004 written test regarding excessive force, on which he received a score of 100%. (Ex. 12.) The second and third documents are "Training Tasks" in the areas of "Crime vs. Property" and "Warrant/Summons Service." (Exs. 13, 14.) Plaintiff does not explain how the written test and Training Tasks reflect an inadequate training program in the area of excessive force or otherwise. Significantly, nothing in the record remotely suggests that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the deficiency exhibits deliberate indifference on the part of municipal policymakers." *Jenkins*, 487 F.3d at 492 (internal quotations omitted).

Nor is there any evidence that Office Bukovic has engaged in a repeated pattern of constitutional

violations such that it would have been obvious to the City that he lacked adequate training. Defendants note that there has been only one other complaint of excessive force lodged against Officer Bukovic, which he received while employed by the Westmont Police Department. A motorist alleged that Officer Bukovic pushed him during a traffic stop, but the complaint was deemed unfounded. (Def. Facts ¶ 91.) Plaintiff concedes that she has no personal knowledge regarding either Officer Bukovic's training or this other complaint of excessive force. (*Id.* ¶ 92.) Thus, Defendants' motion for summary judgment on Plaintiff's failure to train claim is granted.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment [Doc. 61] is denied. Defendants' Motion for Summary Judgment [Doc. 57] is granted in part and denied in part. Specifically, with respect to the Fourth Amendment claim, the motion is granted as to all nonphysical interactions between Plaintiff and Officer Bukovic, but otherwise denied. The motion is granted with respect to Plaintiff's Fourteenth Amendment and failure to train claims.

ENTER:

Dated: June 9, 2008

/s/ Nan R. Nolan
NAN R. NOLAN
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 07 C 06

[Filed May 4, 2009]

JUNE O. CARLSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Judge**
SCOTT BUKOVIC and the	)	**Nan R. Nolan**
CITY OF DARIEN, an Illinois	)	
Municipal Corporation,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff June O. Carlson has charged Officer Scott Bukovic with unreasonable seizure in violation of 42 U.S.C. § 1983. The parties have consented to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and are set to proceed to trial on June 15, 2009. Currently before the court are Officer Bukovic's motions *in limine* and motion to bar expert opinions from Ms. Carlson's treating

physicians. For the reasons set forth below, the motions *in limine* and motion to bar are granted in part and denied in part.

DISCUSSION

A. Motions *in Limine*

A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). *See also American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1463 (7th Cir. 1996) ("A motion in limine is a useful device for trying to exclude evidence before trial in order to prevent the trial from being interrupted by wrangles over admissibility or the jury from getting a whiff of prejudicial evidence that may in fact be inadmissible.") District courts have broad discretion in ruling on motions *in limine*, but evidence should not be excluded before trial unless it is clearly inadmissible on all potential grounds. *Kiswani v. Phoenix Sec. Agency, Inc.*, 247 F.R.D. 554, 557 (N.D. Ill. 2008). Otherwise, rulings should be deferred until trial so questions of foundation, competency, relevancy, and potential prejudice may be resolved in proper context. *Id.*

A court's decision to deny a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. "Rather, denial means the court cannot determine whether the evidence should be excluded outside the trial context.'" *McClain v. Anchor Packing Co.*, No. 89 C 6226, 1996 WL 164385, at *2 (N.D. Ill. Apr. 3, 1996) (quoting *Wolfe v. Howmedica, Inc.*, No. 94 C 4117, 1996 WL 10901, at *2

(N.D. Ill. Jan. 10, 1996)). Accordingly, "[t]rial judges may alter prior '*in limine* rulings, within the bounds of sound judicial discretion.'" *Kiswani*, 247 F.R.D. at 557 (quoting *Townsend v. Benya*, 287 F. Supp. 2d 868, 872 (N.D. Ill. 2003)).

Officer Bukovic has filed 13 motions *in limine*, seven of which are contested. The court addresses all of the motions below.

1. Unopposed Motions

Ms. Carlson does not object to Officer Bukovic's motions *in limine* regarding witnesses, insurance, indemnification, settlements and *Monell* claims. Thus, motions *in limine* 1-6 are granted as follows:

(1) non-party witnesses who will testify in this case will be excluded from the courtroom until they are called to testify;

(2) Ms. Carlson will not make any reference to the City of Darien's insurance, FED. R. EVID. 411;

(3) any witnesses not disclosed pursuant to FED. R. CIV. P. 26 and 37 are excluded from testifying;

(4) any evidence of indemnification is excluded, *see Delgado v. Mak*, No. 06 C 3757, 2008 WL 4367458, at *3 (N.D. Ill. Mar. 31, 2008) (quoting *Lawson v. Trowbridge*, 153 F.3d 368, 379 (7th Cir. 1998)) ("In the general case courts exclude evidence of indemnification out of a fear that it will

encourage a jury to inflate its damages award because it knows the government - not the individual defendants - is footing the bill.");

(5) all evidence of settlement negotiations between the parties, including Paul Carlson and Wal-Mart, is excluded; and

(6) all evidence regarding the policies, practices, customs and procedures of the City of Darien and/or the Darien Police Department is excluded. In addition, Ms. Carlson may not inquire into whether Officer Bukovic received prior citizen complaints or internal discipline, or has ever been sued for any alleged violations of someone's civil rights. FED. R. EVID. 404(b); *Carr v. City of Chicago*, 911 F.2d 736 (Table) (7th Cir. 1990).

2. Disputed Motions

The parties dispute the remaining motions *in limine* 7-13.

a. Evidence Surrounding Defendant's Departure from Darien Police Force

In July 2005, several months after the January 2005 incident involving Ms. Carlson, Officer Bukovic decided to leave the Darien Police Department and continue his law enforcement career at another department. Officer Bukovic argues that the reasons for this personal decision are unrelated to this lawsuit, and substantially more prejudicial than probative. Ms. Carlson questions the truth of Officer Bukovic's stated

reason for leaving the department, but offers absolutely nothing to suggest that it was in any way related to the incident with her on January 3, 2005. The court agrees that the evidence of Officer Bukovic's departure is substantially more prejudicial than probative, and the motion *in limine* to bar this information is granted. FED. R. EVID. 403; *Thompson v. City of Chicago*, 472 F.3d 444, 456 (7th Cir. 2006) ("Evidence is considered unfairly prejudicial, not merely because it damages the opposing party's case, but also because its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented.") (internal quotations omitted).

b. Elevation of Plaintiff's Blood Pressure

Ms. Carlson's medical records reflect that she experienced elevated blood pressure following the incident with Officer Bukovic. Officer Bukovic seeks to exclude this evidence as purely speculative and irrelevant to the issues of liability or damages. There is no evidence, for example, that Ms. Carlson suffered any medical conditions directly related to this temporary rise in blood pressure. Ms. Carlson does not dispute this fact, but argues that "[e]vidence of significantly elevated blood pressure is probative and/or corroborative . . . of a traumatic event occurring." In Ms. Carlson's view, this evidence tends to support her version of the encounter with Officer Bukovic, and is also relevant to her claim of emotional anguish damages.

The problem with Ms. Carlson's argument is that she has not identified a medical expert who can testify that the slight elevation in blood pressure observed

several hours after her encounter with Officer Bukovic was in fact related to that encounter, as opposed to some other cause. Ms. Carlson may testify during the damages phase of the trial that she experienced emotional distress as a result of Officer Bukovic's actions, and she may describe how she felt. She may not, however, mention an elevation in her blood pressure. This motion *in limine* is granted.

c. Lawfulness of Plaintiff's Presence on Wal-Mart Premises

Testimony in this case indicates that Wal-Mart's store manager told Officer Bukovic that she wanted Ms. Carlson escorted out of the store. Ms. Carlson refused to leave and maintains that she had a right to stay in the store even when asked to leave because she was not committing a criminal trespass. Under Illinois law, a criminal trespass occurs when a person, among other things, (1) "knowingly and without lawful authority enters or remains within or on a building;" or . . . (3) "remains upon the land of another, after receiving notice from the owner or occupant to depart." 720 ILCS 5/21-3(a)(1) and (3). For purposes of subsection (1), there is no criminal trespass where a person is "in a building which is open to the public while the building is open to the public during its normal hours of operation." *Id.* Ms. Carlson insists that she was on Wal-Mart's premises lawfully under subsection (1) and, thus, Officer Bukovic had no authority to try and physically escort her from the premises. Officer Bukovic focuses on subsection (3), which governs a person's right to remain on land after being asked by the owner to leave. Ms. Carlson says, without any supporting citation, that a Wal-Mart "building" is not "land" under this subsection.

This dispute goes to the issue of the reasonableness of any alleged "seizure" of Ms. Carlson. Ms. Carlson has suggested that only three factors are relevant in making a reasonableness determination: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether she is actively resisting arrest or attempting to evade arrest by flight. This list, however, is not exhaustive. Rather, "[w]hether the force used to effect a seizure is excessive depends on the totality of circumstances under an objective reasonableness standard. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Marion v. City of Corydon, Indiana*, 559 F.3d 700, 705 (7th Cir. 2009) (internal quotations and citations omitted). "Importantly, all of these facts and circumstances 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir. 2007) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

The court is concerned that injecting the issue of criminal trespass will mislead and confuse the jury and lead to unfair prejudice. *Thompson*, 472 F.3d at 456 ("Rule 403 provides a district court with discretion to exclude evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.") Specifically, the jury should not get sidetracked with a dispute as to whether Ms. Carlson violated the Illinois criminal trespass statute, which is not an allegation in this case. This is especially true because Ms. Carlson's parsing of the statute to insist that

Officer Bukovic should have known that being asked to leave "land" is not the same as being asked to leave a "building" arguably is not reasonable, particularly where he was faced with an evolving situation. *Graham*, 490 U.S. at 396-97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.")

Contrary to Ms. Carlson's suggestion, an actual criminal violation is not necessary to justify a seizure by Officer Bukovic. Rather, the relevant issue is the reasonableness of Officer Bukovic's actions and beliefs given the situation unfolding in front of him – even if his beliefs ultimately prove incorrect. *See, e.g., Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007) ("The reasonableness of [a] seizure turns on what the officer knew, not whether he knew the truth or whether he should have known more.")

It is for the jury to decide whether Ms. Carlson refused to leave the Wal-Mart store even after the manager asked Officer Bukovic to escort her out; and whether Officer Bukovic acted reasonably in attempting to secure Ms. Carlson's cooperation. Ms. Carlson has no legal claim that Wal-Mart was somehow required to let her stay on the premises, and she may not argue that she was legally entitled to remain at Wal-Mart after being asked to leave. Nor may she make any reference to the criminal trespass (or any other criminal) statute, or argue generally that she was not committing a crime. Indeed, it is undisputed that Officer Bukovic never charged Ms.

Carlson with committing any crime. Ms. Carlson may argue only that she did not want to leave and that she did not believe she was trespassing because the store was open to the public; she was there during normal business hours; and she was not creating a disturbance. Officer Bukovic, in turn, may argue that he believed Ms. Carlson was trespassing because the store owner wanted her to leave; she refused his order to leave; and she was behaving in a disruptive manner.

d. Plaintiff's Citizen's Complaint to Hinsdale Police Department

Following the incident at Wal-Mart, Plaintiff contacted the Hinsdale Police Department to make a citizen's complaint against Officer Bukovic. Officer Bukovic argues that evidence of this complaint is irrelevant because he was a Darien police officer and the Hinsdale police told Ms. Carlson that they could not take her report. Ms. Carlson argues that she should be allowed to testify to the fact that she lodged a timely complaint, and relate the contents of that complaint to the jury.

The fact that Ms. Carlson attempted to file a complaint with the Hinsdale Police Department is not relevant to the issue of whether Officer Bukovic "seized" her or used excessive force against her. The alleged contents of that complaint are similarly not probative because the department never took her statement or prepared a written report. The motion *in limine* to bar evidence of Ms. Carlson's citizen's complaint to the Hinsdale Police Department is granted in its entirety.

e. Plaintiff's Citizen's Complaint to Darien Police Department

In addition to the Hinsdale complaint, Ms. Carlson also filed a citizen's complaint against Officer Bukovic with the Darien Police Department. The department conducted an investigation, but due to Ms. Carlson's refusal and/or inability to cooperate, the complaint was deemed unfounded. Officer Bukovic argues that evidence of this complaint and investigation is irrelevant to whether he seized or used excessive force against Ms. Carlson. Ms. Carlson does not object to this motion as long as (1) she is allowed to testify to the fact that she made a prompt complaint and describe the substance of that complaint; and (2) she may introduce evidence showing the relationship between the investigation and Officer Bukovic's departure from the Darien Police Department.

Once again, the fact that Ms. Carlson lodged a complaint with the Darien Police Department is not relevant to the issue of whether Officer Bukovic "seized" her or used excessive force against her. Notably, the telephone report provides no details regarding what allegedly occurred, and Ms. Carlson never followed up on the complaint. As explained earlier, moreover, the reasons behind Officer Bukovic's departure from the Darien Police Department are not relevant to this case. Thus, Ms. Carlson may not introduce evidence showing the alleged relationship between the investigation and Officer Bukovic's departure. This motion *in limine* is granted.

f. Alleged Violations of Department Policies

Officer Bukovic next seeks to preclude evidence as to whether he violated Darien Police Department rules or policies, or deviated from his training procedures. Officer Bukovic directs the court to *Thompson v. City of Chicago*, where the Seventh Circuit found that a general order of the Chicago Police Department "sheds no light on what may or may not be considered 'objectively reasonable' under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter." 472 F.3d at 454. Ms. Carlson agrees with this general proposition, but argues that "order[s], policies and procedures that have ***specific*** application to the facts at hand are relevant." (Pl. Resp., at 5 (emphasis in original).) The court disagrees.

The Seventh Circuit "has consistently held that '42 U.S.C. § 1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices.'" *Thompson*, 472 F.3d at 454 (quoting *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003)). "In other words, the violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established." *Id*. Officer Bukovic's motion *in limine* to bar evidence of alleged violations of Darien Police Department policies, rules or procedures is granted.

g. Defendant's Touching of Service Weapon

Ms. Carlson's son, Paul, claims that during the encounter on January 3, 2005, Officer Bukovic placed

his hand on his service weapon in an apparent show of force. Officer Bukovic contends that this alleged show of force is irrelevant and prejudicial because it was not directed at Ms. Carlson, who is the only plaintiff in this case. Ms. Carlson insists that the action "is probative of Defendant's willingness to consider the use of excessive force in a non-criminal context." (Pl. Resp., at 5.) It is worth reiterating here that neither Ms. Carlson nor Paul will be permitted to testify regarding any criminal statutes, nor can they argue generally that they were not committing any crimes.

As for the evidence at issue, the court agrees with Officer Bukovic that his alleged show of force does not in any way constitute a seizure of Ms. Carlson. To the contrary, Ms. Carlson did not see Officer Bukovic's alleged action and it was unconnected to her physical contact with him. *See California v. Hodari D.*, 499 U.S. 621, 626-27 (1991) (no seizure if officer's show of force does not either physically touch the individual or compel her to submit to the officer's authority). In fact, it appears that Paul's observation occurred after the physical encounter with Ms. Carlson had ended. *See Carlson v. Bukovic*, No. 07 C 06, 2008 WL 2397682, at *5 (N.D. Ill. June 9, 2008) (citing testimony that Paul reported seeing Officer Bukovic place his hand on his service revolver after the physical encounter with Ms. Carlson had ended and Paul was pouring her some water with the officer's permission). In addition, there is no claim that Officer Bukovic unholstered or used his service weapon at any time.

If the evidence establishes that Paul saw Officer Bukovic touch his service weapon after the physical encounter with Ms. Carlson, then it is not relevant to whether he seized her or used excessive force against

her during the encounter, and is substantially more prejudicial than probative. *Thompson*, 472 F.3d at 456 ("Evidence is considered unfairly prejudicial, not merely because it damages the opposing party's case, but also because its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented.") (internal quotations omitted). If, on the other hand, the evidence establishes that Paul saw Officer Bukovic touch his service weapon before or during the physical encounter with Ms. Carlson, then Paul may testify as to what he saw. The court will then issue an appropriate limiting instruction to the effect that touching a service weapon is not evidence of a seizure.

B. Motion to Bar Expert Testimony

Ms. Carlson has identified four treating physicians as witnesses in this case: (1) Dr. Lisa Fortman; (2) Dr. Brian Kern; (3) Dr. Gene Harvey; and (4) Dr. Robert Trefil. Ms. Carlson has at all times maintained that she does not intend to elicit any expert testimony from these doctors and, consistent with this representation, she has not submitted any corresponding expert reports under Rule 26(a)(2). The parties agree that these treating physicians are allowed to offer testimony regarding their observations of Ms. Carlson and whether their observations were consistent with Ms. Carlson's representations. The parties also agree that the doctors cannot offer any testimony or opinions as to Ms. Carlson's prognosis or any future disability. (Pl. Resp., at 4.) This portion of the motion to bar is granted. The only issue left to be decided, therefore, is whether the four treating physicians will be allowed to

provide testimony or opinions regarding the cause of Ms. Carlson's conditions.

Ms. Carlson contends, without any supporting citation, that causation testimony does not constitute expert testimony requiring a Rule 26(a)(2) expert report because it goes to the issue of whether the physicians' observations were consistent with her statements to them. The court has found a split of opinion on this issue. *Compare McCloughan v. City of Springfield*, 208 F.R.D. 236, 241-42 (C.D. Ill. 2002) (collecting cases) (treating physicians may offer opinion testimony on causation without submitting a Rule 26(a)(2)(B) report), *with Krischel v. Hennessy*, 533 F. Supp. 2d 790, 795 (N.D. Ill. 2008) ("[W]hen the testimony of a treating physician goes beyond the scope of treatment, observation, and diagnosis, and includes opinions on causation . . ., the treating physician must provide a report" pursuant to Rule 26(a)(2)(B)).

Putting the report issue to one side, it is clear that any causation testimony offered by a treating physician must satisfy the requirements of Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Fuesting v. Zimmer, Inc.*, 594 F. Supp. 2d 1043, 1045 (C.D. Ill. 2009). Rule 702 allows an expert to offer an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702. *See also Boim v. Holy Land Found. for Relief and Development*, 549 F.3d 685, 726 (7th Cir. 2008). In *Daubert*, the Supreme Court held that courts must "serve as gatekeepers so that unreliable expert

testimony does not carry too much weight with the jury." *United States v. Ozuna*, 561 F.3d 728, 737 (7th Cir. 2009). The objective of *Daubert* is to ensure that "an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). The party seeking to present expert testimony bears the burden of demonstrating that it meets the requirements of Rule 702 and *Daubert*. *Fuesting*, 594 F. Supp. 2d at 1045; *Krischel*, 533 F. Supp. 2d at 797.

With these parameters in mind, the court considers the prospective causation testimony of each of the four treating physicians.

1. Dr. Fortman

Ms. Carlson concedes that Dr. Fortman will not be called to offer any opinions on the issue of causation. The motion to bar such testimony is granted.

2. Dr. Kern and Dr. Harvey

Dr. Kern is the Hinsdale Hospital emergency room physician who treated Ms. Carlson on the evening of her encounter with Officer Bukovic. Dr. Kern does not recall whether he ever treated or saw Ms. Carlson before or after January 3, 2005, and he has no personal knowledge as to what transpired between Ms. Carlson and Officer Bukovic. (Kern Dep., at 5.) Dr. Harvey is a family practice physician who treated Ms. Carlson from January 6, 2005 until he retired in April 2005. Dr. Harvey similarly has no personal knowledge

regarding Ms. Carlson's encounter with Officer Bukovic, or her medical history prior to January 6, 2005.

Ms. Carlson represents that Dr. Kern and Dr. Harvey will be called upon to testify only that the injuries they observed were consistent with her claimed version of events. This testimony will be allowed. The physicians may not, however, offer any opinions suggesting that the injuries were in fact "caused" by Officer Bukovic or his alleged actions. Dr. Harvey further may not testify as to how older individuals may react when subjected to a trauma, or opine that Ms. Carlson's preexisting conditions "flared up" because of the incident with Officer Bukovic. Dr. Harvey testified at his deposition that it "would not be unusual" for a pre-existing condition to "flare up," which is opinion testimony not based upon personal observation.

3. Dr. Trefil

Dr. Trefil is Ms. Carlson's treating dentist. Dr. Trefil is expected to testify that he fitted Ms. Carlson for partial dentures in 1996, and that when he saw her on April 15, 2005, they were no longer fitting properly. Ms. Carlson reportedly told Dr. Trefil that she had not worn her partials since the incident with Officer Bukovic. Ms. Carlson concedes that Dr. Trefil cannot offer an opinion as to whether the incident with Officer Bukovic caused her to stop wearing her dentures. Rather, he would testify only to the general proposition that failing to wear dentures for a period of time may cause teeth to shift. Of course, such testimony does not reflect Dr. Trefil's treatment of Ms. Carlson and is, therefore, classic expert testimony. *See Dereak v. Don*

Mattox Trucking, LLC, No. 06-3123, 2007 WL 3231417, at *5 (C.D. Ill. Oct. 30, 2007) ("[W]hen testimony goes beyond the scope of treatment and the observations of the treating physician, it constitutes expert testimony.")

It is true that Ms. Carlson did not submit an expert report from Dr. Trefil under Rule 26(a)(2)(B), but she did disclose him as an expert witness under Rule 26(a)(2)(A). In addition, Officer Bukovic has had an opportunity to depose Dr. Trefil and to test his dental credentials in order to prepare for trial. On these facts, the court will allow Dr. Trefil to testify generally that failing to wear dentures may cause teeth to shift enough that the dentures no longer fit. He may also testify that Ms. Carlson told him she had stopped wearing her dentures in January 2005 after her encounter with Officer Bukovic. Dr. Trefil may not, however, opine in any way that Ms. Carlson was unable to wear her dentures following the January 2005 incident, or that the dentures stopped fitting because of Officer Bukovic's actions.

CONCLUSION

For the reasons stated here, Defendant's Motions *in Limine* [112] and Motion to Bar Expert Opinions [110] are both granted in part and denied in part.

ENTER:

Dated: May 4, 2009

/s/ Nan R. Nolan
NAN R. NOLAN
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 07 C 06

[Filed June 18, 2009]

June O Carlson	)
	)
v.	)
	)
Scott Bukovic	)
	)

JUDGMENT IN A CIVIL CASE

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that verdict is returned in favor of Defendant Scott Bukovic and against Plaintiff JuneO Carlson.

Michael W. Dobbins, Clerk of Court

Date: 6/18/2009

/s/ Lynette Santiago, Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 09-2578

[Filed October 4, 2010]

JUNE O. CARLSON,

Plaintiff-Appellant,

v.

SCOTT BUKOVIC, et al.,

Defendants-Appellees.

Before

KENNETH F. RIPPLE, Circuit Judge
DANIEL A. MANION, Circuit Judge
DIANE S. SYKES, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:07-cv-00006

Nan R. Nolan, Magistrate Judge.

ORDER

Upon consideration of plaintiff-appellant's petition for rehearing en banc, filed on September 16, 2010, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby **DENIED**.

APPENDIX F

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT EXHIBIT 2

PLAINTIFF'S TRIAL EXHIBIT 6 (RECEIVED)

DARIEN POLICE DEPARTMENT
RESISTANCE RESPONSE
REPORT

Case No.: 05-046
Date: 01-03-05 Time: 1647

Reporting Officer: S. BUKOVIC #338

Suspect's Name: CARLSON, JUNE O

Suspect's Approximate Age: 83
Height: 503
Weight: 135

Location: WAL-MART (2189 75th ST) LAY-AWAY DEPT.

TYPE OF FORCE USED BY OFFENDER (may check more than one)	
1. ☒ Fist or Hands	4. ☐ Firearm Displayed
2. ☐ O.C./Chemical Spray	5. ☐ Firearm Fired

3. ☐ Club/Bludgeon	6. ☒ Other (describe) PASSIVE/ RESISTIVE
POLICE FORCE USED (may check more than one)	
1. ☒ Hands	5. ☐ Service Pistol Fired On-Duty
2. ☐ O.C. Spray	6. ☐ Service Pistol Fired Off-Duty
3. ☐ ASP	7. ☐ Carbine Fired
4. ☐ Less Lethal Weapon	8. ☐ Other (describe)
STATUS	
1. ☒ On-Duty	4. ☐ Off-Duty
2. ☐ Uniformed	5. ☐ Plainclothes
3. ☐ Indoors	6. ☐ Outdoors

GENERAL INFORMATION			
1. Type of Location:	☐Single Family ☐Street/ Road ☐Other; describe:	☐Multi-Family ☐Field	☒Business (INSIDE)
2. Lighting Conditions:	☐Daytime ☒Good Artificial	☐Dusk ☐Poor Artificial	☐Night
3. Weather Conditions:	☐Clear ☐Fog	☐Cloudy ☐Snow	☐Rain ☐Dusk
4. Manner of Involvement	☐On-View ☐Back-Up	☐Radio Dispatched ☐Other	☒Primary

5. Photos Taken of Injuries:	□Yes	⊠No; if no, explain:

INJURIES	
1. □	No Visible Injury, No Complaint of Pain: □Suspect □Officer
2. □	No Visible Injury, Complaint of Minor Pain, No Medical Treatment Required: □Suspect □Officer
3. ⊠	Minor Visible Injury (redness, swelling, abrasion), No Medical Treatment Required: ⊠Suspect □Officer
4. □	Injury Requiring Outpatient Medical Treatment (stitches, x-rays, doctor exam): □Suspect □Officer
5. □	Injury Requiring Overnight Hospitalization: □Suspect □Officer
6. □	Fatality Involved: □Yes □No

FIREARM DISCHARGE	
1. Weapon Description:	
2. Type of Ammunition Used:	3. Number of Shots Fired:
4. Did You Reload? □Yes □No	
5. Officer Position: □Standing □Sitting □Kneeling □Prone □Other; describe:	
6. Are You: □Right-Handed □Left Handed	
7. Gun Worn: □Shoulder Holster □Belt □Right-Side □Left Side □Other; describe:	
8. Describe Protective Cover:	

9. Did Your Weapon Function Properly: ☐Yes ☐No; explain:	
Officer's Signature: /s/ S. Bukovic #338	Date 01-03-05
Officer In Charge Signature: /s/	Date 1-5-05
Sergeant's Signature: /s/	Date 1-5-05
Deputy Chief's Signature: /s/	Date 1/6/05
Chief's Signature: /s/	Date 1-6-05

*RESISTANCE RESPONSE REPORT SHALL BE SUBMITTED TO A DEPUTY CHIEF WITH THE APPROVED CASE/INCIDENT REPORT. THE DEPUTY CHIEF WILL FORWARD THE ORIGINAL REPORT TO THE RECORDS DIVISION AND ADMINISTRATIVELY FILE THE RESISTANCE RESPONSE REPORT FOLLOWING THE CHIEF'S APPROVAL.

X:\353-708\Deputy Chief\PROCEDURES\Resistance Response Report Form.doc Revised 5/29/03

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(2)

FEB 4 - 2011

No. 10-876

IN THE

Supreme Court of the United States

JUNE O. CARLSON,

Petitioner,

v.

SCOTT BUKOVIC AND CITY OF DARIEN, ILLINOIS, AN ILLINOIS MUNICIPAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's ruling in the case of *Ortiz v. Jackson*, Supreme Court No. 09-737 (decided January 24, 2011) is determinative.

2. Whether Petitioner June Carlson misstates the record when describing the Seventh Circuit Court of Appeals' ruling. The Seventh Circuit, reviewing the claim *de novo*, ruled her Fourth Amendment excessive force claim was submitted correctly to the jury under *Graham v. Connor*, 490 U.S. 386 (1989) standards.

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STATEMENT

Plaintiff June Carlson filed a complaint for violation of her Fourth Amendment rights pursuant to 42 U.S.C. 1983. Count I was titled "Unreasonable Seizure in the Nature of Assault and Battery." (*Petition for Writ of Certiorari (Hereinafter "Petition"), p. 11; 41a).* This count alleged respondent Scott Bukovic had used "unnecessary force" in committing an "unreasonable seizure" of Carlson's person.

Count I put Bukovic on notice that he was defending himself against a claim of excessive force. (*Petition, p. 6a).* Carlson avowed she was not bringing a claim for false arrest under the Fourth Amendment. (*Petition, p. 6a).* Bukovic defended himself at all times in the trial court under this Court's guidance in *Graham v. Connor,* 490 U.S. 386 (1989). (*See Also, Petition, pp. 48a-50a).* He asserted qualified immunity as a defense and, at the appropriate time, filed a motion seeking summary judgment based upon qualified immunity. *(Petition, pp. 48a-50a).*

Carlson filed her own motion for summary judgment on Count I and sought an order declaring liability on the theory that Bukovic had used "per se unreasonable force" against her. (*Petition, pp. 12a-13a).* The trial court found that, under this Court's ruling in *Graham v. Connor,* 490 U.S. 386 (1989), and similar cases, a fact issue precluded summary judgment on all the individual parties' summary judgment motions and held a trial on plaintiff's Fourth Amendment excessive force claim. (*Petition, pp. 43a-47a).* The trial court granted summary judgment on the City of Darien's motion. (*Petition p. 60a).*

The jury returned a special interrogatory for Bukovic, finding that no seizure had occurred. (*Petition p. 12a*). The trial court entered judgment in his favor. (*Petition, Appendix D, p. 78a*).

Carlson appealed the final judgment as well as the adverse summary judgment ruling. The Seventh Circuit Court of Appeals heard Carlson's arguments and affirmed the trial court's entry of judgment on all counts in favor of Bukovic. (*Petition, Appendix A, pp. 26a-27a).* In doing so, the Seventh Circuit examined at length Carlson's argument that summary judgment should have been entered in her favor. (*Petition, pp. 12a-23a).* The Seventh Circuit viewed the facts in the light most favorable to Bukovic and affirmed the decision to send Carlson's Fourth Amendment excessive force claim to the jury. (*Petition, p. 19a*).

The Seventh Circuit's affirmation of the denial of Carlson's summary judgment is the only ruling petitioner seeks review. (*Petition, p. 32).* Carlson has asked this Court for *certiorari* in order to remand the case to the trial court for "further consideration" of her Count I. (*Petition, p. 32*).

SUMMARY OF THE ARGUMENT

1. This Court's January 24, 2011 ruling in *Ortiz v. Jackson*, Supreme Court No. 09-737 (decided January 24, 2011) ends petitioner's case. Petitioner's appeal of the denial of her summary judgment motion after there has been a trial is no longer possible, given the ruling in *Ortiz*.

2. Carlson misstates the record regarding the Seventh Circuit's ruling on her "per se unreasonable" theory of liability. The Seventh Circuit, reviewing the claim *de novo,* ruled that the trial court was correct to submit the Fourth Amendment excessive force claim to the jury. Carlson's formulations of the law misstate Fourth Amendment principles.

ARGUMENT

1. This Court's Decision In *Ortiz v. Jackson* Decides Carlson's Petition Against Her

The Court issued its opinion in the *Ortiz v. Jackson,* Supreme Court No. 09-737 (decided January 24, 2011) case after Carlson filed her petition for *certiorari.* In *Ortiz,* the issue was whether an adverse summary judgment ruling was appealable after a trial was held. On January 24, 2011, this Court ruled that such an appeal was prohibited.

a. *Ortiz v. Jackson*

As this Court is well aware, the *Ortiz* case was a civil rights case (pursuant to 42 U.S.C. 1983) where the trial court denied the police officer defendants' motion for summary judgment. The officers had claimed qualified immunity. The trial court found that there were genuine issues of material fact that precluded a grant of qualified immunity, and the officers did not take an interlocutory appeal. The jury returned a verdict against the officer defendants and judgment was entered against them. The defendants failed to move the trial court for judgment as a matter of law under Rule 50(b).

Instead, on appeal to the Sixth Circuit Court of Appeals, the officers argued that they should be granted qualified immunity. The Sixth Circuit analyzed their claims and decided that, yes, qualified immunity should be granted. The Sixth Circuit directed judgment to be entered in favor of the defendants.

This Court, on January 24, 2011, ruled that the qualified immunity grant by the court of appeals was improper. The Court ruled that the officers' motion for summary judgment was not procedurally proper before the appellate court. The officers had foregone their right to review of the trial court's qualified immunity decision by not pursuing an interlocutory appeal. At a minimum, the officers, post-verdict, should have sought Rule 50(b) relief if they wanted to preserve the issues of judgment as a matter of law for appellate review.

This Court's ruling on January 24, 2011 ends the circuit conflict as to whether a party can appeal a summary judgment ruling after a full trial on the merits has been held. The answer is no.

b. *Ortiz v. Jackson* As Applied To the Petition Here

The *Ortiz* decision resolves Carlson's petition for *certiorari* against her. The appeal of a summary judgment order after a full trial on the merits is held is no longer available after *Ortiz*. Here, the district court denied Carlson's motion for summary judgment on her claim that there was a "per se" unreasonable seizure. Carlson did not seek Rule 50(b) relief after the verdict was rendered against her. There is no longer an opportunity for her

to seek relief on appeal of the denial of her summary judgment motion.

The fact that the *Ortiz* case dealt with a defendant's qualified immunity request at summary judgment does not save Carlson's claim. The Court was clear in its January 24, 2011 decision that the rule is that a party may no longer appeal a summary judgment motion after a trial on the merits is held. This Court gave no exceptions to the rule and none are warranted in Carlson's case.

The *Ortiz v. Jackson* case that Carlson relies on in her petition for *certiorari* is determinative of her request. This Court determined in *Ortiz* that the petitioner's request for *certiorari* should be denied.

2. Carlson's Petition Misstates the Seventh Circuit's Ruling

Assuming this Court finds an exception to the *Ortiz v. Jackson* case and considers the substance of petitioner's argument, the petition should not be granted. The misstatement of what the Seventh Circuit actually ruled as opposed to what is argued in the petition is significant. Once the misstatements are corrected, the Seventh Circuit's opinion is legally correct and there is no need to grant Carlson's petition.

a. Petitioner Received *De Novo* Review

Petitioner crucially misstates the record on the important issue of exactly what the Seventh Circuit did and did not rule. Petitioner claims that she was entitled to *de novo* review of her appeal of the summary judgment

ruling, but did not receive it. (*Petition, p. 16*). According to petitioner, the Seventh Circuit's failure to grant her *de novo* review is reversible error. The assertion by petitioner that she did not receive *de novo* review is incorrect. The Seventh Circuit examined her motion for summary judgment under the *de novo* standard. The Seventh Circuit merely agreed that the trial court was correct that factual issues precluded the grant of summary judgment and a trial on the merits was proper.

As evidence of the misstatement by the petitioner, the opinion of the Seventh Circuit is the key. In beginning its analysis of the question presented by Carlson, the appellate court wrote that it "understood" that Carlson's arguments were limited to the denial of her summary judgment motion. (*Petition p. 12a-13a, fn.* 13). The Seventh Circuit noted that any claims regarding the sufficiency of the evidence were waived once Carlson did not file a Rule 50 motion. This initial statement clearly shows that the Seventh Circuit was examining her claim as a matter of law. Then, after a lengthy and thorough analysis of the relevant Fourth Amendment principles, the Seventh Circuit wrote: "We conclude, accordingly, that the district court correctly submitted the matter to the jury." (*Petition, p.* 19a). The Seventh Circuit was without question analyzing her claim under *de novo* review.

Because petitioner misstates what type of review the Seventh Circuit gave her claim, her petition should be denied.

b. The Petitioner's Formulations of the Law Are Incorrect

Petitioner is left trying to advance in this Court her twice-rejected argument about what she actually alleged in her Count I. (*Petition p. 19a-23a; 43a-50a*). It is apparent that petitioner misunderstands the nature of the Fourth Amendment excessive force claim she alleged and the reason why the jury ruled as it did.

Petitioner asserts she framed her Count I as "an iteration" of Fourth Amendment excessive force claims that would require a lower burden of proof. (*Petition p. 21*). She also asserts that the Seventh Circuit recognized her "iteration" in its opinion. (*Petition, pp. 20-21*). Her theory of a "per se unreasonable force" simply misstates Fourth Amendment claims of excessive force as announced by this Court. Petitioner additionally misstates what the Seventh Circuit ruled in its opinion.

This Court has clearly established the elements of a Fourth Amendment excessive force claim. In *Graham v. Connor*, 490 U.S. 386 (1989) this Court required that there be (a) a seizure and (b) objectively unreasonable force used for a violation of Sec. 1983 under the Fourth Amendment. This Court has revisited the *Graham v. Connor* standard but never departed from the requirement that the seizure element and the objective unreasonableness element be proven by a plaintiff separately and distinctly. *See, Scott v. Harris*, 550 U.S. 372 (2007); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *California v. Hodari D.*, 499 U.S. 621 (1991).

Petitioner maintains, despite the body of law from this Court and the courts of appeal, that her alleged claim for "per se unreasonable seizure" falls under the rubric of a Fourth Amendment excessive force claim. *Petition pp. 19-21.* It seems that petitioner is seeking to have this Court abandon the second half of the analysis of *Graham v. Connor* in Fourth Amendment excessive force cases. Petitioner simply fails to understand the implication of her pleading a Fourth Amendment excessive force claim and her admitted failure to plead a Fourth Amendment false arrest claim.

The district court understood that petitioner's Fourth Amendment excessive force claim was governed by *Graham v. Connor.* (*Petition, pp. 43a-50a*). The Seventh Circuit affirmed the district court's summary judgment rulings and jury instructions under *Graham v. Connor.* (*Petition pp. 12a-23a*). In particular, the appellate court directly addressed the petitioner's misstatement and misunderstanding of Fourth Amendment excessive force claims (versus Fourth Amendment false arrest claims) in its opinion at Footnote 19. (*Petition, pp. 21a-22a, fn. 19*). In that footnote, the appellate court explained that the analysis of a seizure in a false arrest case will focus on "unreasonableness," but the proper inquiry of what is unreasonable in an excessive force case will turn on the "totality of the circumstances" as governed by *Graham v. Connor.* (*Petition p. 21a-22a, Fn. 19*)("A seizure without probable cause is conceptually different from a seizure that employs excessive force; both are unreasonable, but for different reasons").

Despite this clear statement of the law governing "reasonableness" in the Fourth Amendment excessive

force context, petitioner insists that her "iteration" of "per se unreasonableness" is a valid cause of action. To the contrary, and as the Seventh Circuit quoted petitioner's counsel, the formulation of this purported claim would render an officer constantly liable for any touching of an individual that was not arrested "no matter how brief" if the officer did not have probable cause to arrest the individual. *Petition, p. 13a (quoting Carlson's counsel).* This is simply not a correct statement of law. *See, Petition p. 21-22 fn. 19 (dismissing the theory).*

The Seventh Circuit discussed the appropriate use of force by an officer on a non-arrestee in its opinion. It is a complicated issue and, in this case, one resolved by the jury. But the Seventh Circuit is correct when it wrote that:

> We must remember that police officers find themselves in a myriad of contentious, and potentially explosive, situations where in an effort to defuse the situation, a combination of verbal declarations and gestures must be employed. When considered in context, such actions may be more exhortatory than commanding in nature.

Petition, p. 19a.

This common-sense statement is torn apart under petitioner's "per se unreasonable" theory of excessive force. Petitioner wants this Court to adopt a rule whereby no officer could use any force on a non-arrestee (unless, later, a determination of probable cause is made). (*Petition p. 19*). This simply is not the law of the Fourth Amendment as declared by this Court, nor should it

be. Because petitioner misstates the law governing Fourth Amendment excessive force claims and gives no compelling reason why such a drastic change in the law is warranted, the petition should be denied.

CONCLUSION

Petitioner's request for a writ of *certiorari* should be denied. This Court's decision in *Ortiz v. Jackson* forecloses review. If the Court decides that the matter is not foreclosed by *Ortiz v. Jackson*, the petition should be denied for the remaining reasons set forth herein.

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No. 10-876

In the Supreme Court of the United States

JUNE O. CARLSON,

Petitioner,

v.

SCOTT BUKOVIC and
CITY OF DARIEN, ILLINOIS,
an Illinois Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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RESPONDENTS' RESPONSE TO QUESTION 2 AND THE SUPPORTING ARGUMENT (Petition, pp. 25-28) CONFIRMS IMPORTANT QUESTIONS OF FEDERAL LAW WERE DECIDED IN A MANNER CONFLICTING WITH THIS COURT'S DECISIONS. 2

A) THE COURTS BELOW VIOLATED ESTABLISHED CONSTITUTIONAL PRECEDENTS IN RULING THAT THE THEORY OF *PER SE* UNREASONABLE SEIZURE FOR WANT OF PROBABLE CAUSE IS AVAILABLE ONLY IN THE CONTEXT OF FALSE ARREST. 2

B) RESPONDENTS ERR IN VIEWING *PER SE* UNREASONABLE SEIZURES AS A SUBSET OF EXCESSIVE FORCE CLAIMS. 5

C) RESPONDENT AND THE COURTS BELOW ERRED AS A MATTER OF ESTABLISHED FEDERAL CIVIL PRACTICE IN BARRING CARLSON FROM BEING HEARD ON THE MERITS, EITHER AT SUMMARY JUDGMENT OR AT TRIAL, OF HER *PER SE* UNREASONABLE SEIZURE THEORY. 6

D) RESPONDENTS' BRIEF (p. 9) CONFIRMS THAT THE PANEL BELOW REINVENTED THE TEST OF "SEIZURE" IN DEFIANCE OF THE TEST ESTABLISHED BY THIS COURT IN *FLORIDA v. BOSTICK*, *TERRY v. OHIO* and *DELAWARE v. PROUSE* and the SEVENTH CIRCUIT'S COMPATIBLE DEFINITION IN *ACEVEDO v. CANTERBURY* 8

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Appendix G: Defendants Scott Bukovic and City of Darien's 56.1(b)(3) Response to Plaintiff's Statement of Facts (April 25, 2008) 1a

TABLE OF CITED AUTHORITIES

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Terry v. Ohio,
392 U.S. 1 (1968) . . . . . *passim*

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV . . . . . *passim*

ARGUMENT

Respondents' Brief does not contest the key assertions of Carlson's Petition that:

- Respondents' Response to Carlson's Statement of Facts supporting her summary judgment motion admitted every allegation regarding Bukovic's seizure of petitioner and absence of probable cause (Petition, pp. 17, 29);

- Bukovic admitted applying two levels of physical contact to enforce his directive that Carlson leave the store upon pain of arrest for criminal trespass (Petition, pp. 8, 9);

- Bukovic admitted submitting to his department his report (Petition Appendix F) which admitted using injurious force;

- the panel's Opinion suppressed any reference to that Appendix F admission (Petition, p. 30);

- Bukovic lacked probable cause under Illinois' criminal trespass statute which decriminalized remaining in buildings open to the public during normal business hours (Petition, pp, 11, 12);

- Carlson was denied procedural due process of law per the third Question Presented and its supporting argument (Petition, pp. 28-32).[1]

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[1] Respondents (p.2) groundlessly allege: "The Seventh Circuit viewed the facts in the light *most favorable* to Bukovic ... " In truth, the panel denied Carlson fair appellate review and

RESPONDENTS' RESPONSE TO QUESTION 2 AND THE SUPPORTING ARGUMENT (Petition, pp. 25-28) CONFIRMS IMPORTANT QUESTIONS OF FEDERAL LAW WERE DECIDED IN A MANNER CONFLICTING WITH THIS COURT'S DECISIONS.

Respondents' Brief confirms that, in adopting their Fourth Amendment understanding, the courts below have stood Fourth Amendment jurisprudence on its head. Unless certiorari review is granted, a legal cancer will be injected into this vital part of the American constitutional fabric which protects American citizens from abuse at that hands of officials entrusted with the powers and duties of law enforcement.

A) THE COURTS BELOW VIOLATED ESTABLISHED CONSTITUTIONAL PRECEDENTS IN RULING THAT THE THEORY OF *PER SE* UNREASONABLE SEIZURE FOR WANT OF PROBABLE CAUSE IS AVAILABLE ONLY IN THE CONTEXT OF FALSE ARREST.

Respondents' Brief, p. 9, purporting to cite to Petition, p. 19, reads: "Petitioner wants this Court to adopt a rule whereby no officer could use any force *on*

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procedural due process of law by not so viewing the facts but rather by impermissibly *spinning the record more favorably* to Bukovic than the facts admitted by him allow (Petition pp. 28-31, (unrebutted)).

a non-arrestee (unless, later, a determination of probable cause is made)."[2] Continuing,

> Petitioner simply fails to understand the implication of ... her admitted failure to plead a Fourth Amendment *false arrest* claim. *** [T]he appellate court directly addressed the petitioner's misstatement and misunderstanding of Fourth Amendment excessive force claims (versus Fourth Amendment *false arrest* claims) (Response, p. 8).
>
> [A]s the Seventh Circuit quoted petitioner's counsel, the formulation of this purported claim would render an officer constantly liable for any touching of an individual *that was not arrested* 'no matter how brief' if the officer did not have probable cause to arrest the individual. Petition, p. 13a (quoting Carlson's counsel[3]). This is

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[2] This statement is correct but for three important details. First, as expressly set forth at Petition, p. 19 and in Carlson's Briefs below, the phrase "could use any force" as formulated by Carlson reads "could use any force *for law enforcement purposes* ..." (Petition, p. 19, "he admitted each and every allegation pertaining to respondent's seizure of petitioner under color of authority *for law enforcement purposes*.") Second, as discussed herein, Carlson recognizes the *Terry v. Ohio* protective seizure and weapons search exception to the probable cause requirement. Third, as also explained herein, this Court has already adopted the rule opposed by Respondents and disregarded by both courts below.

[3] The panel's Opinion, in truth, wasn't "quoting Carlson's counsel." Carlson's counsel never took that position (*see*, Petition, p. 31, point (C)). Carlson's actual verbatim argument was: "On the undisputed facts of this case, Defendant Bukovic Committed a Per Se Unreasonable Seizure If he Lacked Probable Cause to

simply not a correct statement of law. *See*, Petition, p. 21a-22a fn. 19 (dismissing theory) The Seventh Circuit discussed the appropriate use of force by an officer on a *non-arrestee* in its opinion ...." (Response, p. 9).

Instead of responding to the decisions of this Honorable Court and lower courts (at Petition, pp. 27, 28), which establish that a seizure--not made for the purpose of permitting the officer to make a *Terry* self-protective pat-down search and not backed by probable cause--is *per se* unreasonable *irrespective of whether an arrest is actually made*, Respondents, employing circular reasoning, rely exclusively upon two portions of the panel's decision to argue the correctness of that decision! In actuality, Respondents and both courts below lost track of this Court's key and plainly explicated constitutional jurisprudence. Fourth Amendment seizures are found "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" (*Graham v. Connor*, 490 U.S. at 395). *Terry v. Ohio* affirmed that "[w]e do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizure through the warrant process ... or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." (392 U.S. at 20). *Terry* held that a non-arrest seizure wasn't *per se* unreasonable, despite

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Believe Plaintiff Was Engaged in the Commission of a Criminal Offense because he admits giving a command *for law enforcement purposes* aimed at removing the Plaintiff from a retail store, and enforcing that command with objected-to physical contact with Plaintiff's person which the Defendant Officer admits physically injured the Plaintiff." (Appellant's Brief, p. 27).

the absence of probable cause to justify either seizure or an arrest, by laying down this exception to that usual requirement of probable cause: that a protective seizure and search for weapons of a person who the officer believes may be connected with criminal activity and who the officer, in questioning as part of a criminal investigation, has reason to believe, based upon specific and articulable facts and rational inferences therefrom, is an armed and dangerous individual doesn't constitute an unreasonable seizure *per se*. Apart from the probable cause requirement and the *Terry* exception, the Fourth Amendment "proceeds as much by limitation upon the scope of governmental action *as by imposing preconditions upon its initiation*." (392 U.S. at 28, 29). The decisions below obliterate critical Fourth Amendment *preconditions* upon Bukovic's initiation of governmental action for law enforcement purposes against Carlson's person as an elderly female citizen by throwing out, in a gross error of constitutional law, the requirements of probable cause (or the *Terry* exception) and substituting an *ad hoc* rule of reasonable degree of force in any circumstances of an officer's own choosing so long as he decided to refrain from making an arrest.

B) RESPONDENTS ERR IN VIEWING *PER SE* UNREASONABLE SEIZURES AS A SUBSET OF EXCESSIVE FORCE CLAIMS.

Respondents (pp. 8, 7) argue:

> Petitioner maintains ... that her alleged claim for "*per se* unreasonable seizure" falls under the rubric of a Fourth Amendment excessive force claim. *** .

> Her theory of a "*per se* unreasonable force" simply misstates Fourth Amendment claims of excessive force ... .

Respondents misunderstand Carlson's position and Fourth Amendment jurisprudence: Carlson hasn't described her "*per se* unreasonable seizure" claim as being a subset of an excessive-degree-of-force claim but rather as an independent theory of unreasonable seizure; neither did the panel below (*see*, footnote 19 at Petition, 21a).

C) RESPONDENT AND THE COURTS BELOW ERRED AS A MATTER OF ESTABLISHED FEDERAL CIVIL PRACTICE IN BARRING CARLSON FROM BEING HEARD ON THE MERITS, EITHER AT SUMMARY JUDGMENT OR AT TRIAL, OF HER *PER SE* UNREASONABLE SEIZURE THEORY.

Respondents (pp. 1, 7) state:

> Count I put Bukovic on notice that he was defending himself against a claim of excessive force.
>
> It is apparent that petitioner misunderstands the nature of the Fourth Amendment excessive force claims she alleged ...

The import of these statements is that Bukovic claims he was put on notice of *only* one of two legal theories presented by Carlson to the courts below such that Carlson is limited only to an excessive-degree-of-force claim of unreasonable seizure and cannot be heard on her *per se* unreasonable claim of unreasonable seizure,

even though the panel correctly acknowledged: "Throughout the district court proceedings, Ms. Carlson maintained that she was 'seized as a matter of law' and that the seizure was '*per se* unreasonable.'" (Petition, p. 13a).

Both courts below erred in refusing to allow Carlson to raise her claim that Bukovic committed a *per se* unreasonable seizure of her person for want of probable cause because a false arrest claim wasn't present (*see*, Point A, *supra*). But Respondents and the courts below also disregard established rules of federal civil practice:

Respondents tellingly ignore that the Complaint specifically alleged that Carlson was not committing any crime and that the City had failed to train Bukovic "in his handling of non-criminal matters, especially those involving elderly women." (Petition, p.11). Respondents also don't rebut that the Complaint never utilized the term "excessive force" (Petition, p. 11); hence, suggesting, as the panel did (Petition, p. 2a), that Carlson was proceeding on only the excessive-degree-of-force theory of unreasonable seizure is untenable. Instead, the Complaint expressly described the claim against Bukovic as being for an "unreasonable seizure" of Carlson's person. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (*Conley v. Gibson*, 355 U.S. 41 at 48 (1957)).

The courts below disregarded and violated plainly established precedent of the Seventh Circuit Court of

Appeals: "The point of a notice pleading standard is that the plaintiff is not required to plead ... *legal theories*." (*Hefferman v. Bass*, 467 F.3d 596 at 599 (7th Cir. 2006)). The contrary import of Respondents' statements– namely, that because Carlson's Complaint didn't expressly use the words "*per se* unreasonable seizure," she's barred from presenting that theory, both at summary judgment and at trial–borders on the preposterous.

D) RESPONDENTS' BRIEF (p. 9) CONFIRMS THAT THE PANEL BELOW REINVENTED THE TEST OF "SEIZURE" IN DEFIANCE OF THE TEST ESTABLISHED BY THIS COURT IN *FLORIDA v. BOSTICK*, *TERRY v. OHIO* and *DELAWARE v. PROUSE* and the SEVENTH CIRCUIT'S COMPATIBLE DEFINITION IN *ACEVEDO v. CANTERBURY*

Terry v. Ohio (Petition, pp. 25, 26), clearly describing the non-arrest fact pattern of the instant case, states:

> *It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime*–'arrest' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he *has*[4] 'seized' the person. 392 U.S. at 16

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[4] not "*may have* seized"

Bukovic admitted (Petition, pp. 7, 8) Carlson wasn't free to walk away elsewhere in the Wal-mart store or even a few feet to sit down next to her injured son as he worked on his accident report.

The panel below defied the law of evidentiary admissions and this Court's test of seizure by insisting, through what Respondents call a "common-sense statement" (Brief, p. 9), that a determination of seizure can *never* be made by a trial court as a matter of law but rather that such determinations necessarily involve speculation reserved for the finder of fact:

> Officer Bukovic's contact with Ms. Carlson's arm ***may have been*** so light and so momentarily that it did not convey ... a demonstration of anything more than an encouragement that she leave .... We must remember that police officers find themselves in a myriad of contentious, and potentially explosive, situations where in an effort to defuse the situation, a combination of verbal declarations and gestures must be employed. When considered in context, such actions ***may be*** more exhortatory than commanding ... . (Petition, p. 19a)

In adopting this speculation test ("may have been"; "may be"), the panel refused to examine the actual record of admissions by Bukovic which conclusively shows that the speculation standard adopted by the panel had no connection to the reality of the situation as acknowledged by Bukovic himself and constituted a refusal by that panel to review the facts of the case in light of the just-quoted definitive, non-speculative test laid down in *Terry v. Ohio* (*see*, footnote 4)

Bukovic himself admitted he wasn't in a potentially explosive situation with an unarmed, octogenarian women. She merely wanted to remain inside a store she had rightfully entered to assist her injured, disabled adult son and finish shopping.

E) RESPONDENTS' ERROR RE: *GRAHAM v. CONNOR*'S APPLICATION

Respondents (p. 8) argue: "It seems that petitioner is seeking to have this Court abandon ... the analysis of *Graham v. Connor* in Fourth Amendment *excessive force cases*." (emph. added). Respondents forget that the plaintiff citizen Graham hadn't alleged that the defendant officer lacked probable cause; therefore Graham hadn't made a claim that his seizure was *per se* unreasonable; instead this Court's Opinion makes clear that the sole theory presented was an "excessive force" claim which this Court determined was cognizable as an unreasonable seizure under the Fourth Amendment, not a substantive due process claim (490 U.S. at 395). That Opinion recognizes both Fourth Amendment theories of unreasonable seizure:

> The Fourth Amendment is not violated by an arrest *based on probable cause* ... With respect to a claim of *excessive force, the same standard* of reasonableness at the moment applies ..." (490 U.S. at 396)

Notwithstanding *Graham v. Connor* being exclusively an excessive force case, the first sentence just quoted is the Court's recognition of its established line of cases holding that arrest (or other seizure) not based on probable cause (or, as not relevant here, the *Terry* protective search exception to the probable cause

requirement) is *per se* unreasonable under the Fourth Amendment.

GIVEN THE SPECIFIC AND SIGNIFICANTLY DIFFERENT ADJUDICATIVE PATTERN IN *ORTIZ v. JORDAN*, THIS COURT'S RULING THEREIN ONLY PARTIALLY RESOLVES THE SPLIT BETWEEN THE CIRCUITS RE: REVIEWABILITY OF ANY AND EVERY DENIAL OF SUMMARY JUDGMENT (Question 1 and Supporting Argument at Petition, pp. 15-25)

Respondents (p. 2) trumpet: "This Court's January 24, 2011 ruling in *Ortiz v. Jackson* (sic) ... ends petitioner's case. Petitioner's appeal of the denial of her summary judgment motion after there has been a trial is no longer possible ...."

Even if Respondents' view that *Ortiz* precludes appellate review of the denial of Carlson's summary judgment motion were correct, they overlook that Carlson's Petition to this Court is based upon two other independent reasons:

(1) Per Petition, p.14, the courts below (in pretrial rulings and affirmance thereof upon jury instructions and special verdict forms and the grant of Bukovic's Motion in Limine) refused to permit Carlson to proceed to jury trial on the theory of *per se* unreasonable seizure for want of probable cause. These pretrial rulings repeated the errors made in the rulings upon (and appellate review of) the denial of Carlson's summary judgment motion against Bukovic and are reviewable as questions of law notwithstanding the absence of Rule 50 motions.

(2) Question 3 and its unrebutted supporting argument likewise stand, irrespective of reviewability of summary judgment denial.

As to *Ortiz*, Respondents fail to address its distinguishing features (Petition, pp. 22, 23).

The material facts of immunity in *Ortiz* were genuinely in dispute when summary judgment was denied the defendant. In contrast, Bukovic admitted every summary judgment allegation of *material* fact bearing on seizure and lack of probable cause (*see*, Statements 59-69.1 of Appendix G). Neither court actually determined there were *material* issues of fact warranting denial of Carlson's summary judgment motion. The District Court merely states "[t]here is a *question of fact*[5] as to the nature of the physical interaction between Plaintiff and ... Bukovic." (p. 47a) Given Bukovic's admissions of Statements 59-69.1 of Appendix G, the trial court was apparently looking at the dispute on the face of the pleadings over the degree of force Bukovic used which dispute wasn't present in the parties' submissions re: Carlson's motion for summary judgment. That dispute *wasn't material* to Carlson's motion for summary judgment predicated on the *per se* unreasonable theory of unreasonable seizure. Similarly, the panel never considered what facts were *material* to Carlson's *per se* unreasonable theory of commission of an unreasonable seizure by Bukovic; instead the panel wrote: "Ms. Carlson's version of the facts, *described in her motion*, was very different from the version described by the defendants." (p. 6a) This statement was untrue (*see*,

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[5] rather than "a question of *material* fact"

Appendix G) but likewise might be referencing the pleadings dispute. The panel's just-quoted observation confirms it never determined that an issue of *material* fact over Carlson's *per se* unreasonable seizure theory actually was presented by the summary judgment submissions.

In *Ortiz*, the officer was allowed to re-present his immunity defense at trial. *Ortiz* also held that a defendant's failure to make Rule 50 motions is fatal to appellate review but only after this Court *independently* (i.e., at ¶5 of footnote 6) determined through *de novo* review that the District Court had properly found genuine issues of *material* fact present at summary judgment. In contrast, Carlson was barred from re-presenting at trial her *per se* unreasonable seizure claim. Therefore, her forgoing of Rule 50 motions at trial of her excessive-degree-of-force claim shouldn't affect appellate review of either denial of summary judgment grounded upon her other Fourth Amendment theory (*per se* unreasonable seizure for want of probable cause) or rejection of her related jury instructions and the correlative grant of Bukovic's Motion in Limine which kept that theory from being tried.

Respondents (pp. 5, 6) challenge Carlson's statement (Petition, top p. 18) that she wasn't afforded *de novo* review *of the summary judgment record*. Contrast the *Ortiz* opinion's *de novo* review through specific enumeration of disputed summary judgment facts with the panel below's abject failure to *identify* any issues of material fact present on the face of the parties' actual summary judgment submissions. Reviewing Appendix G reveals the panel failed to identify any because not one such issue existed.

CONCLUSION

Wherefore, June Carlson respectfully requests that the Court reject Respondents' arguments and grant her relief.

Respectfully submitted,

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APPENDIX G

12045

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No.: 07 C 0006

[Filed April 25, 2008]

JUNE O. CARLSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	Magistrate Judge Nolan
	)	
SCOTT BUKOVIC, and the CITY OF DARIEN, an Illinois Municipal Corporation,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS SCOTT BUKOVIC AND CITY OF DARIEN'S 56.1(b)(3) RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

NOW COME Defendants, SCOTT BUKOVIC and the CITY OF DARIEN, by and through their

attorneys, James L. DeAno, Laura L. Scarry and Scott Dolezal of DeANO & SCARRY, and pursuant to Local Rule 56.1(b)(3) hereby submit the following Response to Plaintiff's Statement of Facts in Support of Her Motion for Summary Judgment:[1]

Parties and Jurisdiction

1. At all times relevant to her complaint, Plaintiff, June Carlson, was a citizen of the United States of America, residing in the Village of Hinsdale, DuPage County, Illinois. See, Complaint at ¶ 3, Dckt. 1, attached to Defendants' Statement of Facts as Exhibit A. At the time of the incident, Plaintiff was 83 years old. Id.

Response: Admit.

2. Defendant, Officer Scott Bukovic, was at all relevant times employed by the City of Darien as a police officer. Complaint, ¶ 4.

Response: Admit.

3. Defendant, City of Darien, is an Illinois Municipal Corporation and at all relevant times was an employer of Defendant, Scott Bukovic. Complaint, ¶ 5.

Response: Admit.

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[1] Plaintiff's Rule 56.1(a)(3) Statement of Facts mirrors Defendants' Cross-Rule 56.1(a)(3) Statement of Facts with some minor exceptions. Even so, to prevent confusion, Defendants chose to follow Local Rule 56.1(b)(3) to the letter by admitting and denying Plaintiff's Rule 56.1(a)(3) Statement of Facts.

4. Jurisdiction is proper because this is a civil action to redress alleged violations under the Fourth and Fourteenth Amendments of the United States Constitution and under the civil rights laws of the United States of America, specifically, 42. U.S.C. § 1983. Complaint, ¶ 1.

Response: Admit.

Material Facts

5. On January 3, 2005, June shared a residence with her adult son, Paul, in Hinsdale, IL. June Carlson ("June"), dep. tr. 6-7, attached to Defendant's Statement of Facts as Exhibit B. At that time, Paul was 59 years old. Paul Carlson ("Paul"), dep. tr. 7, attached to Defendant's Statement of Facts as Exhibit C.

Response: Admit.

6. [Not Used]

7. On June 3, 2005 at approximately 3:00 p.m., June and Paul went shopping at the Wal-Mart store located in Darien, IL. June, dep. tr. 14; Paul, dep. tr. 12-13. Paul drove his truck to the store. Paul, dep. tr. 13, 106.

Response: Admit.

8. After arriving at the Wal-Mart store, June and Paul separated to shop for their own items. June, dep. tr. 15; Paul, dep. tr. 13-14. After shopping for his items, Paul started to look for his mother. Paul, dep. tr. 14.

Response: Admit.

9. As he was pushing his cart, his arm brushed up against a fire hose box that had a sharp edge exposed on the bottom corner of the box. Paul, dep. tr. 14-15. As a result, Paul received a cut on his arm. Paul, dep. tr. 14.

Response: Admit.

10. Paul wanted to find a manager to report the accident. Paul, dep. tr. 15. He located an assistant manager, Dale Hardick. Paul, dep. tr. 15-16; Dale Hardick ("Hardick"), dep. tr. 9, 12-13, attached to Defendant's Statement of Facts as Exhibit D. Paul told Hardick about his injury and brought him to the fire hose box to show him what happened. Paul, dep. tr. 16.

Response: Admit.

11. After viewing the fire hose box, Hardick brought Paul back to the personnel office located near the layaway area. Paul, dep. tr. 17-18; Hardick, dep. tr. 17; Sue Katsaros ("Katsaros"), dep. tr. 15-18, attached to Defendant's Statement of Facts hereto as Exhibit E.

Response: Admit.

12. Hardick told the personnel manager, Sue Katsaros, that Paul had scratched his arm. Katsaros, dep. tr. 19. Hardick began to complete a report of the accident by obtaining the information from Paul. Paul, dep. tr. 20; Katsaros, dep. tr. 19-20.

Response: Admit.

13. Brandon Hunter, the co-manager for the Wal-Mart store, had been notified of the incident and went to the personnel office. Brandon Hunter ("Hunter"), dep. tr. 15-19, attached to Defendant's Statement of Facts as Exhibit F; Paul, dep. tr. 17. After speaking with Hardick, Hunter spoke with Paul about what happened. Paul, dep. tr. 17-18. After telling Hunter what happened, Paul insisted on speaking to the store manager. Paul, dep. tr. 18-19.

Response: Admit.

14. Paul also wanted his mother with him. He was concerned that the communication between him and Wal-Mart personnel would be difficult because he is hard-of-hearing. Paul 22-24. He did not have his hearing aids with him at the time due to dampness caused by the weather. Id. He thought his mother would be able to assist with communicating with Wal-Mart personnel. Id.

Response: Admit.

15. As June was shopping, she received a page over the intercom. Katsaros, dep. tr. 23-24; Paul, dep. tr. 24; June, dep. tr. 15.

Response: Admit.

16. In the meantime, Katsaros had attempted to administer first aid to Paul's cut. Paul, dep. tr. 25; Katsaros, dep. tr. 21-22. There was a first aid kit in the personnel office. Katsaros, dep. tr. 22.

Response: Admit.

17. Paul did not like the first aid kit because it was kept in a white plastic storage box. Paul, dep. tr. 26- 27. In his opinion, it was not a typical first aid kit and looked like "junk" and a "mess". Id.

Response: Admit.

18. Paul informed Hunter that he was allergic and diabetic (Paul, dep. tr. 27). However, according to Paul, Katsaros began to clean his arm with iodine. Paul, dep. tr. 27-28, esp 28, line 1. Paul is allergic to iodine. Id. Katsaros, however, claims she did not place any iodine on Paul's arm. Katsaros, dep. tr. 30-31. Katsaros either offered or placed a Band-Aid on his cut. Katsaros, dep. tr. 22; Paul, dep. tr. 28.

Response: Admit.

19-22. [Not Used]

23. Stacey Johnson was the store manager at the time of the accident. Stacey Johnson ("Johnson"), dep. tr. 12-13, attached to Defendant's Statement of Facts as Exhibit G. After being notified of the incident, she went to the personnel office where Hardick was sitting at a table with Paul obtaining information from him. Johnson, dep, tr. 19; Katsaros, dep. tr. 20.

Response: Admit.

23-40. [Not Used]

41. At some point, while Johnson was speaking to June, Paul looked up and rose from his chair. Although he could not understand what Johnson was saying to June, Paul told Johnson, "Don't you talk that

way to my mom." Paul, dep. tr. 48-49; June, dep. tr. 36. Paul's voice was firm. June, dep. tr. 38. Johnson and Paul were only standing two feet apart with Paul in the customer area in front of the service counter. Johnson, dep. tr. 43. Paul, dep. tr. 52. Paul claims he pointed his finger downward and Johnson claims he pointed his finger at her. Paul dep. tr. 49-52, esp 51; Scott Bukovic ("Bukovic"), dep. tr. 48, attached to Defendant's Statement of Facts as Exhibit J; Bukovic police report # 05-46 ("police report"), attached to Defendant's Statement of facts as Exhibit K. Paul took a step in the direction of the counter and of Johnson (ibid).

Response: Admit.

42-44. [Not Used]

45. Paul did not cross over (i.e., go behind) the counter. Paul, dep. tr. 51-52. When Paul stepped forward, Johnson stepped back. Paul, dep. tr. 52-53 and Paul, in turn, stepped back, Paul, dep. tr. 52. Johnson had been or ended up behind the counter, Johnson dep. tr. 44; Paul, dept tr. 52. Johnson said that she was going to notify the police. Paul, dep. tr. 53. June told Johnson, "Go ahead and call the cops." Paul, dep. tr. 56.

Response: Admit.

46-47. [Not Used]

48. One of the Wal-Mart employees notified the Darien Police Department, Hunter, dep. tr. 33; Johnson, dep. tr. 36; Katsaros, dep. tr. 37-38. While they were waiting for the police, June continued to

speak loudly. Johnson, dep. tr. 49. Within moments, two uniformed male Darien police officers responded to the Darien Wal-Mart store. Johnson, dep. tr. 47-48; Paul, dep. tr. 57.

Response: Admit.

49. Officer Scott Bukovic and Officer Richard Stutte had been dispatched to the store around 4:52 p.m. Bukovic, dep. tr. 31-32; Richard Stutte ("Stutte"), dep. tr. 10-11, attached to Defendant's Statement of Facts as Exhibit L. They received a call of a disturbance involving a male and a female being loud or argumentative. Id.

Response: Admit.

50. Both officers responded to the layaway department. Bukovic, dep. tr. 34; June 42-43. Officer Bukovic was the primary responding officer because the Wal-Mart was in his beat.Officer Stutte was Officer Bukovic's back-up officer. Stutte, dep. tr. 14-16. When they arrived, Johnson, Hunter, and the Carlsons were in the layaway department. Bukovic, dep. tr. 38-39.

Response: Admit.

50.1 Officer Bukovic acknowledges that, upon the officers' arrival at the scene, he observed June Carlson to be calm (Bukovic dept r. 37, 45, 55).

Response: Admit, but further adds that only p. 55 (and not pp. 37 & 45) of Officer Bukovic's deposition transcript supports Plaintiff's assertion.

51. Officer Bukovic asked Johnson what the problem was. Bukovic, dep. tr. 41, 44; Johnson, dep. tr. 57. Johnson attempted to explain what had happened up to this point. Johnson, dep. tr. 57; June, dep. tr. 43. Johnson told Officer Bukovic that Paul had injured himself at the store and that during the process of completing a report for over an hour, Paul had become very loud and boisterous toward Johnson and pointed his finger at her. She also said that she felt threatened by Paul. Bukovic, dep. tr. 44-46.

Response: Admit.

52. [Renumbered as 53.1]

53. When Johnson told Officer Bukovic that she felt threatened when Paul approached her, June called Johnson a liar and denied that Paul ever threatened her. Bukovic, dep. tr. 46-50; Johnson, dep. tr. 59-60; June, dep. tr. 48. June's voice was raised and she was upset and inconsolable. Johnson, dep. tr. 61; Katsaros, dep. tr. 39. June blurted out that Johnson was lying at least twice. Bukovic, dep. tr. 55-56.

Response: Admit.

53.1 As Johnson was relaying the story to Officer Bukovic, June kept interrupting. Johnson, dep. tr 57-58; Bukovic, dept r. 47; June, dep. tr. 45-48; Paul, dep. tr. 63-64. officer Bukovic was standing next to June as he was speaking to Johnson. Paul, dep. tr. 60-62. June made a gesture to get Officer Bukovic's attention, but he turned to her and said, "Hold on a minute. Please don't touch me. Just let this (sic) finish and then we'll move on," or "then we'll talk to you." Johnson, dep. tr. 57-58.

Response: Admit.

54. Officer Bukovic told June that he needed to get Johnson's side of the story andthat he would give her a moment and see what she had to say and then he would get June's sidein a moment. Bukovic, dep. tr. 50-51, 55.

Response: Admit.

55. Officer Bukovic spoke to Paul next. Bukovic, dep. tr. 56-57. Paul explained that he had received a cut on the arm as a result of brushing up against a fire box. Bukovic, dep. tr. 56-57, 86-87. Officer Bukovic went out to the sales floor to examine the box. Bukovic, dep. tr. 86-87.

Response: Admit.

56. Paul also explained that he was hard of hearing and has difficulty speaking. Bukovic, dep. tr. 56-57. Officer Bukovic observed that Paul was adamant, vocal, loud and used his hands to explain his situation. Id. Officer Bukovic was aware from prior experience that hearing-impaired individuals sometimes speak with louder than normal voices (Bukovic, dep. tr. 57). Officer Bukovic explained Paul's condition to Ms. Johnson who expressed surprise at learning that information. Bukovic, dep. tr. 57-58. Even so, Johnson stated that she had felt threatened by Paul. Bukovic, dep. tr. 58-59. Officer Bukovic found Johnson to be credible and thought that Johnson believed that she had felt threatened. Bukovic, dep. tr. 59-62.

Response: Defendants deny the assertion that Officer Bukovic was aware from prior experience that hearing-impaired individuals speak with louder than normal voices because it is not supported in the record cited to by Plaintiff and, therefore, this assertion should be stricken. Defendants admit the remaining assertions in Paragraph 56.

57. Next, Officer Bukovic spoke to June. Bukovic, dep. tr. 64-65. According to the Officer, June would not explain what had happened. All she wanted to do was discuss how Johnson was a liar. Id. June was loud and boisterous, and by this time, she was no longer talking to Officer Bukovic. Instead, she was talking in general so everyone could hear what she had to say. Id.

Response: Admit.

57.1 Officer Bukovic testified that notwithstanding June being loud and boisterous, he had no grounds to arrest her for the offense of disorderly conduct because (1) he was not"alarmed or disturbed" or felt there was any "breach of the peace" and (2) no Wal-Mart representative had sworn out a criminal complaint against her. (Bukovic, dep. tr. 67-69)

Response: Defendants deny that Officer Bukovic did not feel that there was any "breach of the peace." This assertion is not supported by the record. Defendants admit the remaining assertions in Paragraph 57.1. Adding further, Defendants state that Officer Bukovic could not arrest any citizen for disorderly conduct if the disorderly

conduct was directed at him because police officers can not be the victims of disorderly conduct. Only private citizens can be the victims of disorderly conduct. (See, Bukovic dep. tr. 68).

58. Officer Bukovic asked June for her driver's license so that he could determine who he was dealing with. Bukovic, dep. tr. 65-66; Stutte, dep. tr. 32. June inquired why he needed her driver's license as she was not involved in any part of the incident whereby Johnson was accusing her son Paul of threatening her. Id.; police report. In response, Officer Bukovic told Johnson what June said and asked Johnson what she wanted the officers to do. Id.

Response: Admit.

59. Johnson told Officer Bukovic that Paul could stay and complete his statement, but that June had to leave the store because she was being disruptive. Bukovic, dep. tr. 66-67; Paul, dep. tr. 66-67. Officer Bukovic told June that the management of Wal-Mart did not want her in the store, and that she needed to leave. Bukovic, dep. tr. 69-70; Stutte, dep. tr. 29. Officer Bukovic told June that if she refused to leave, he could arrest her for trespass. Bukovic, dep. tr.70-75; Paul, dep. tr. 66-67.

Response: Admit.

60. June retorted that "this was crazy" and that she was not leaving. Bukovic, dep. tr. 75, concerned that her handicapped son had not yet completed his statement, June, dep. tr. 47; see also, point 68-69, *infra*]. Officer Bukovic tried three or more times to

convince June to leave the store, and each time she refused. Bukovic, dep. tr. 75-76; Stutte, dep. tr. 31-32

Response: Admit.

60.1 Notwithstanding her refusals, at no point in time did Officer Bukovic place Mrs. Carlson under arrest for criminal trespass. (Bukovic, dep. tr. 75).

Response: Admit.

61. As Officer Bukovic made his last request, he reached for June's right arm with both of his hands, placing one hand on her forearm and one hand on her upper arm. Bukovic, dep. tr. 76-77, 108-09; police report; Katsaros statement. Officer Bukovic touched June's arms in a calm escorting gesture. Katsaros, dep. tr. 60-64; Katsaros statement. According to one Wal-Mart employees, Officer Bukovic touched June's arms in a calm escorting gesture. Katsaros, dep. tr. 60-64; Katsaros statement. It was an attempt to guide June out of the store as if one was assisting a mother or grandmother in a parking lot in inclement weather. Stutte, dep. tr. 35.

Response: Admit.

62. When Officer Bukovic took hold of her, June "freaked out"—she began to flail her arms, get louder and said, "let go of me!" or "don't touch me!" Bukovic, dep. tr. 76-77; Paul, dep. tr. 72. Officer Bukovic grabbed onto one or both of her arms to prevent her from striking him and at the same time trying to get her to calm down. Id. June had put her hands up and crossed her arms in front of her chest. Paul, dep. tr. 73-74. In the process, June's arms had been pushed

and pulled against her chest. Paul, dep. tr. 75; June, dep. tr. 53-55.

Response: Admit.

63. Paul then came over to assist, and told his mother that she needed to calm down and that she should just leave the store. Bukovic, dep. tr. 77; Paul, dep. tr. 82-83; Katsaros, dep. tr. 54-55. At that point, June was still upset, but she had settled down physically. Id. Because Paul had gotten her to calm down, Officer Bukovic let go of June. Id.

Response: Admit.

64. According to Officer Bukovic, he held onto June for no more than five seconds. Bukovic, dep. tr. 78. Officer Bukovic never handcuffed June or told her that she would be handcuffed. June, dep. tr. 75; Paul, dep. tr. 74. June was never placed under arrest. Katsaros, dep.tr. 93-94.

Response: Admit.

65. June complained that she had high blood pressure and a wheel chair was brought for her to sit in. Paul, dep. tr. 85-88; June, dep. tr. 65; Bukovic, dep. tr. 82. Officer Bukovic asked June if she needed any medical assistance but she refused to acknowledge him. Bukovic, dep. tr. 82-83; Paul, dep. tr. 91-92. June refused any medical treatment, including summoning an ambulance. Id. But was placed in the wheelchair and was taken by Paul to the Hinsdale Hospital Emergency Room ("ER"), after stopping at their Hinsdale home to change her garments soiled from involuntary urination (June Carlson dep., Exhibit 4)

and reporting the incident to the Hinsdale Police Department (June Carlson dep ex. #2). The ER reported her blood pressure as 192 over 78 with a pulse of 103 at 7:42 p.m. and as 148 over 88 with a pulse of 78 at 10:15 p.m. (Plaintiffs Rule 26(a)(1) document #022 attached hereto as Exhibit 1).

Response: Admit.

66. [Not Used]

67. Paul pushed her in the wheelchair out of the store while the two officers followed and placed her in his vehicle. Paul, dep. tr. 93-94.

Response: Admit.

68-69. Paul returned to the store to complete his report and pay for items that he and his mother gathered in the store for purchase. Paul, dep. tr. 102-105. after purchasing the items, Paul was given a receipt that was dated January 3, 2005 with a time of 5:40 p.m. Paul, dep. tr. 105; store receipt, attached as Exhibit P to Defendant's Statement of Facts.

Response: Admit.

69.1 Following the incident, Officer Bukovic prepared and submitted a "Darien Police Department Resistance Response Report" attached hereto as Exhibit 2. the report states that June Carlson sustained "Minor Visible Injury (redness, swelling abrasion). No Medical Treatment Required." Officer Bukovic testified that as a result of the incident, June Carlson sustained redness to her left wrist (Bukovic, dep. tr. 105, 106).

Response: Admit.

70-93 [Not Used]

Respectfully submitted,

SCOTT BUKOVIC and CITY OF DARIEN

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